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85-2142

No.

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

SOUTHWEST SUNSITES, INC.,
GREEN VALLEY ACRES, INC., a Texas Corporation,
GREEN VALLEY ACRES, INC., II, a Texas Corporation,
SYDNEY GROSS and EDWIN KRITZLER,
*Petitioners,*

vs.

FEDERAL TRADE COMMISSION,
*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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26 pp

BEST AVAIL

# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## QUESTION PRESENTED

Whether the Court of Appeals for the Ninth Circuit erred in ruling that the administrative due process and statutory rights of respondents in a Federal Trade Commission adjudication were not infringed when the Commission decided the case under a previously undisclosed theory of deception that required the Commission to prove elements of its charge that were not at issue during the adjudication.

## LIST OF PARTIES

The parties to the proceeding in the Court of Appeals for the Ninth Circuit were petitioners Southwest Sunsites, Inc., Green Valley Acres, Inc., Green Valley Acres, Inc., Sidney Gross and Edwin Kritzler, and respondent Federal Trade Commission.

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## TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTION PRESENTED | i |
| LIST OF PARTIES | i |
| TABLE OF CONTENTS | ii |
| TABLE OF AUTHORITIES | iii |
| REPORTS AND OPINIONS | 1 |
| STATEMENT OF JURISDICTION | 1 |
| STATUTORY PROVISIONS INVOLVED | 1 |
| STATEMENT OF THE CASE | 1 |
| REASONS FOR GRANTING THE WRIT | 3 |
| A. The Federal Trade Commission Decided The Case On A Theory Significantly Different From The One On Which The Case Was Litigated | 3 |
| B. The Decision Below Conflicts With Prior Decisions Of Other Circuits And This Court | 3 |
| C. SWS Had Been Prejudiced By Reliance Upon A New Theory Of Deception | 7 |
| CONCLUSION | 9 |
| APPENDIX | 1a |

## TABLE OF AUTHORITIES


| | Page |
|---|---|
| **CASES** | |
| *Amrep Corp. v. FTC*, 768 F.2d 1171 (10th Cir. 1985). | 3 |
| *Bendix Corp. v. FTC*, 450 F.2d 534 (6th Cir. 1971).... | 4, 5, 7 |
| *In the Matter of Cliffdale Associates, Inc.*, 103 F.T.C. 110 (1984)..... | 3, 8 |
| *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374 (1965)... | 8 |
| *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233 (1972)..... | 4, 6, 7, 9 |
| *In the Matter of Ford Motor Co.*, 87 F.T.C. 756 (1976)..... | 7 |
| *NLRB v. H. E. Fletcher Co.*, 298 F.2d 594 (1st Cir. 1962)..... | 3 |
| *Rodale Press, Inc. v. FTC*, 407 F.2d 1252 (D.C. Cir. 1968)..... | 4, 5, 7 |
| *Southwest Sunsites, Inc. v. FTC*, 785 F.2d 1431 (9th Cir. 1986)..... | 1, 2 |
| *In the Matter of Southwest Sunsites, Inc.*, 3 Trade Reg. Rep. (CCH) ¶ 22,226..... | 1 |
| *In the Matter of Sperry & Hutchinson Co.*, 82 F.T.C. 390 (1973)..... | 7 |
| **STATUTES** | |
| Administrative Procedure Act, 5 U.S.C. § 554(b)..... | 1, 3 |
| 28 U.S.C. § 1254(1)..... | 1 |
| Federal Trade Commission Act, 15 U.S.C. § 45..... | 2 |
| **FEDERAL TRADE COMMISSION POLICIES AND RULES** | |
| FTC Enforcement Policy—Deceptive Acts and Practices (October 14, 1983), 5 Trade Reg. Rep. (CCH) ¶ 50,455 ..... | 3, 7 |
| Rules of Practice of FTC, 16 C.F.R. § 3.43(a)..... | 8 |
| **LAW REVIEW ARTICLES** | |
| Millstein, *The Federal Trade Commission and False Advertising*, 64 Colum. L. Rev. 439 (1964) ..... | 8 |

## REPORTS OF OPINIONS

The decision of the court of appeals is reported at 785 F.2d 1431. The decision of the Federal Trade Commission is not yet officially reported. It is unofficially reported at 3 Trade Reg. Rep. (CCH) ¶ 22,226.

## STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on April 1, 1986. The petition for writ of certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

5 U.S.C. § 554(b):

> Persons entitled to notice of an agency hearing shall be timely informed of—
>
> (1) the time, place, and nature of the hearings;
>
> (2) the legal authority and jurisdiction under which the hearing is to be held, and
>
> (3) the matters of fact and law asserted.
>
> When private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

## STATEMENT OF THE CASE

The five petitioners, Southwest Sunsites, Inc., Green Valley Acres, Inc., Green Valley Acres, Inc., II, Sydney Gross and Edwin Kritzler (hereinafter jointly referred to as "SWS"), were

respondents in a Federal Trade Commission (hereinafter "Commission" or "FTC") adjudication in which they were charged with three counts of unfair or deceptive acts or practices in violation of § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. The petitioners were engaged in the business of selling five- to forty-acre parcels of rural land in west Texas from 1973 until 1978. The petitioners ceased all promotional activities in 1978, and have transacted virtually no sales since then.

The FTC issued an administrative complaint on April 2, 1980. The complaint had three counts: (1) SWS deceptively represented the land to be a good investment with little or no financial risk, and failed to disclose the risk in purchasing the land; (2) SWS deceptively represented the land to be suitable for use as homesites, farms or ranches, and failed to disclose material information concerning the suitability of the land for such uses; and (3) SWS acted unfairly by deceptively inducing the payment of money and retaining the proceeds for land of little or no value as an investment, homesite, farm or for other reasonable use.

A lengthy hearing was held before an administrative law judge ("ALJ") of the Commission. The ALJ heard the testimony of sixty-seven witnesses and personally toured the properties at issue. He dismissed the entire complaint by an initial decision on July 29, 1982.

The staff appealed the dismissal to the Commission. After the case was briefed and argued in early 1983, the Commission in October 1983 issued a policy statement and in 1984 issued a decision in another case redefining the meaning of "deception." The Commission, relying on the new theory of deception, reversed the ALJ's decision in February 1985 and concluded that SWS had violated the FTC Act as alleged.

SWS appealed to the Court of Appeals for the Ninth Circuit. The court of appeals affirmed the decision on April 1, 1986. *Southwest Sunsites, Inc. v. FTC*, 785 F.2d 1431 (9th Cir. 1986).

## REASONS FOR GRANTING THE WRIT

### A. The Federal Trade Commission Decided The Case On A Theory Significantly Different From The One On Which The Case Was Litigated

An administrative law judge of the FTC dismissed the complaint against SWS in an initial decision that was founded on the well-recognized standard of deception that had governed FTC actions for forty years: "Any advertising representation that has the tendency and capacity to mislead or deceive a prospective purchaser is an unfair and deceptive practice." App. 4a. The FTC staff appealed. Following briefing and argument of the appeal, the FTC announced a new standard of deception in a policy statement: "The Commission will find deception if there is a representation, omission or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment." FTC Enforcement Policy—Deceptive Acts and Practices (October 14, 1983), reprinted at 5 Trade Reg. Rep. (CCH) ¶ 50,455. The new standard became binding on the FTC when it was adopted in *Cliffdale Associates, Inc.*, 103 F.T.C. 110 (1984); *Amrep Corp. v. FTC*, 768 F.2d 1171, 1179 (10th Cir. 1985). The FTC decision in the present matter was served on February 4, 1985, sixteen months after the new theory was first announced. During the intervening time, there was no disclosure that the new theory would be enforced retroactively in this case, and no opportunity for SWS to respond to the new theory by offering argument or new evidence. Nonetheless, the FTC found deception based on the new theory.

### B. The Decision Below Conflicts With Prior Decision Of Other Circuits And This Court

On appeal, the Court of Appeals for the Ninth Circuit recognized that due process and the Administrative Procedure Act require that the party proceeded against be informed of the matters at issue and have a "full opportunity" to address them. App. 4a. This conclusion is unassailable.[1] The court further

[1] Administrative Procedure Act, 5 U.S.C. § 554(b); *NLRB v. H. E. Fletcher Co.*, 298 F.2d 594, 600 (1st Cir. 1962).

recognized that where the FTC decides the case on a theory different from the one alleged, where different defenses and proofs would be used, the party is denied its rights unless it is given a fair opportunity to present its defense to the new theory. App. 4a. Finally, the court ruled that the new theory of deception *is* different from the old theory because the FTC's burden requires three elements of proof not necessary under the old theory of deception. Under the new theory, the three new elements that the FTC must prove are: (1) likelihood of deception instead of merely tendency and capacity; (2) likely deception of consumers acting reasonably, instead of merely any consumers; and (3) likelihood of reliance and injury instead of merely that the representation might have been considered important irrespective of reliance or injury. App. 5a.

Nonetheless, the court affirmed on the basis that SWS was not prejudiced by deciding the case on a new theory of deception. The justification for its affirmance was "[a]ll evidence relevant to the old theory was necessarily relevant to the new." App. 5a.

By adopting this novel "relevance" test, the Ninth Circuit's decision conflicts with the rule established by the Sixth Circuit in *Bendix Corp. v. FTC*, 450 F.2d 534 (6th Cir. 1971), and the D.C. Circuit in *Rodale Press, Inc. v. FTC*, 407 F.2d 1252 (D.C. Cir. 1968). Moreover, it is inconsistent with this Court's ruling in *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233 (1972). In *Bendix* and *Rodale*, other circuits ruled that the Federal Trade Commission infringes a respondent's rights when, by changing theories midstream, it deprives the respondent of a fair opportunity to address the theory on which the case is decided. In *FTC v. S&H*, this Court held that the Commission cannot substitute theories even though evidence relevant to the new theory may already be in the record.

The Sixth Circuit correctly recognized that the law requires that "if there would have been any difference in defending the action based on the [old] theory as compared to the [new] theory, Bendix was entitled to an opportunity to defend against

the theory upon which the Commission acted." *Bendix*, 450 F.2d at 541. In other words, if there is any difference between the two theories such that Bendix would have offered evidence or argument relevant to the new theory that was not relevant to the old theory, Bendix's rights are infringed if it is denied the opportunity to offer that evidence or argument. *Id.* at 549-42.

It was the absence of opportunity to address the new theory that was found to violate the respondent's rights in *Bendix*. The court pointed out that the Commission "decided the case on a theory of illegality which was never charged, raised, nor tried during the administrative hearing; never presented for consideration by the Hearing Examiner; and not raised as an issue or discussed by Complaint Counsel in the appeal. . . ." *Id.* at 537. It noted also that Bendix "was accorded no opportunity to present evidence in defense of this [new] theory." *Id.* This is precisely the same situation as occurred in the present case. However, the *Bendix* court saw that the key was the absence of opportunity to address the new issue, not merely whether the evidence in the record would have been relevant to the new issue.

In *Rodale Press*, the D.C. Circuit also recognized that the determinative issue is whether the party had "the *opportunity* to present argument under the new theory of violation." 407 F.2d at 1257 (emphasis in original). This test focuses on the question misapprehended in the present case. If there was an argument or evidence the defending party could have presented under the new theory that would not have been relevant under the old, then its rights were infringed if it was denied the opportunity to present that argument or evidence. The *Rodale* court explicitly rejected the position of the Ninth Circuit. It ruled that:

> The evil at which [section 5 of the APA] strikes is not remedied by observing that the outcome would perhaps or even likely have been the same. It is the *opportunity* to present argument under the new theory of violation, which must be supplied.

*Id.* at 1259 (emphasis in original).

The court of appeals here considered whether evidence relevant under the old theory would have also been relevant under the new. Because the new theory sets a higher standard for the Commission to meet, the answer clearly is yes. But the court did not look at the critical issue. When it raised the standard of proof, the Commission obligated itself to prove matters that were not necessary to prove under the old theory. In light of the fact that proof of these matters was not necessary at the time the case was adjudicated, the critical issue is whether SWS had a fair opportunity to offer evidence or argument directed at these new issues. If not, SWS's rights were infringed. This conclusion would have been clear under the law in the Sixth and District of Columbia Circuits, but was obscured by the erroneous test formulated by the Ninth Circuit.

This Court considered the same question in a closely analogous situation in *FTC v. S&H*, 405 U.S. 233 (1972). The Commission found that S&H violated the FTC Act through actions that were contrary to the antitrust laws. The Court of Appeals for the Fifth Circuit reversed the Commission's order on the grounds that the contested conduct did not violate the letter or spirit of the antitrust laws, and the Commission had no power to find an act an unfair method of competition unless it violated the letter or spirit of the antitrust laws. This Court ruled that the Commission does have authority beyond the antitrust laws.

In light of this expansive reading of the FTC Act, the Commission argued in *FTC v. S&H* that its order should be affirmed on the grounds that the conduct, although not violating the antitrust laws, was nonetheless unfair. This Court rejected the Commission's ploy. It would not allow the Commission to substitute theories while the case was on appeal. While the circumstances of the *S&H* case were admittedly different from the present, one aspect of the decision is precisely on point. The Court noted that the Commission's findings, and presumably the evidence supporting those findings, would have been a sufficient basis for the Commission's order under the new theory. *Id.* at 248. Or, in the jargon of the Ninth Circuit, the evidence offered with respect to the old theory was also relevant to the new theory that the Commission sought to

substitute. However, because the Commission's decision had not been based on the new theory, the Court remanded the matter. *Id.* at 250.

On remand, the Commission ordered the parties to brief the new theory. *In the Matter of Sperry & Hutchinson Co.*, 82 F.T.C. 390 (1973). Under the formulation enunciated herein by the Ninth Circuit, the briefing would not have been necessary because the evidence already in the record was relevant to the new theory. Nonetheless it was recognized then, and should be now, that administrative due process and the Administrative Procedure Act demand that the respondent have the opportunity to address the new theory.

### C. SWS Had Been Prejudiced By Reliance Upon A New Theory Of Deception

A remand in this instance would not be an empty formality. There are critical issues that were never addressed by either party when the case was litigated. Argument on these issues could very well have altered the outcome of the case. A few examples will illustrate that the outcome could have been different had SWS been accorded an opportunity to address the new theory, though as *Bendix* and *Rodale Press* make clear, the loss of opportunity is what deprives a party of its rights irrespective of the effect on the outcome.

In announcing the new theory of deception, the FTC emphasized that it would be relevant to survey consumers to determine the likelihood of deception. 5 Trade Reg. Rep. (CCH) at 56,073 n. 8. Under the theory of deception at the time of the adjudication such evidence would have been irrelevant. In *Ford Motor Co.*, 87 F.T.C. 756 (1976), the respondent offered survey evidence to demonstrate consumer understanding of the representation. The FTC did not even consider the evidence, because it was irrelevant under the standard of deception then in effect. *Id.* at 794-95. In light of the *Ford* decision, there was no meaningful opportunity for SWS to offer survey evidence when the case was litigated under the old theory, and no such evidence was offered. Such evidence would have been relevant, and perhaps decisive,

under the new theory of deception. See also Millstein, *The Federal Trade Commission and False Advertising*, 64 Colum. L. Rev. 439, 478 (1964). SWS was therefore denied the opportunity to offer evidence that would have been important under the theory of deception that guided the Commission's decision, and SWS was denied also the opportunity to argue that complaint counsel failed to meet their burden of proof by failing to offer extrinsic evidence of consumer beliefs.

Nor was the issue of reliance litigated before the ALJ. Under pre-existing law, it would have been unavailing for SWS to have offered evidence that consumer decisions were not actually affected by the alleged representations. *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374 (1965). But under the new standard of deception, evidence that the representations did not alter consumer behavior could have been decisive. *Cliffdale Associates*, 103 F.T.C. at 196.

The change in theories also denied SWS the opportunity to address the effect of the change on the *staff's* case. The staff has the burden of proof. Rules of Practice of FTC, 16 C.F.R. § 3.43(a). The new theory requires the staff to prove the *likely* understanding of *reasonable* consumers to their *detriment*. The staff offered no evidence on these new issues, and SWS had no opportunity to address these critical omissions.

The change in theory also denied SWS the right to have the issues of likelihood, reasonableness and injury decided in the first instance by the ALJ who observed the witnesses. By changing theories after the ALJ had relinquished jurisdiction, the FTC circumvented all issues of credibility, a particularly unfair procedure in a case where the ALJ found the staff's witnesses less credible than SWS's witnesses.

There are thus substantial arguments that could have been made and evidence that could have been crucial under the new theory that would not have been relevant under the old theory. It was the absence of opportunity for SWS to present such argument and evidence that poisoned the FTC proceeding. The Ninth Circuit, however, in focusing on whether the evidence relevant to the old standard would also be relevant under

the new, failed to consider whether SWS had a fair opportunity to present evidence and argument under the new theory that might not have been offered under the old.

There is, therefore, a split among the circuits on how to determine whether a respondent has been denied statutory and due process rights in an administrative adjudication where the agency decides the case on the basis of a theory different from the one alleged in the complaint and litigated by the parties. Two circuits have ruled that rights are denied if the respondent was denied the opportunity to present evidence or argument relating to the new theory. This test is consistent with the outcome of *FTC v. S&H* in this Court. Under this test, it would have been found that SWS's rights were infringed. The Ninth Circuit ruled herein that rights are denied only if evidence relevant to the old theory would not necessarily be relevant to the new. Under that erroneous formulation of the law, the court incorrectly found that SWS's rights were not infringed, notwithstanding the lack of opportunity to address the new theory of deception. This split among the circuits merits consideration by this Court.

## CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

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APPENDIX

FOR PUBLICATION

# United States Court of Appeals

FOR THE NINTH CIRCUIT

C.A. No. 85-7182

FTC No. 9134

SOUTHWEST SUNSITES, INC., GREEN VALLEY ACRES, INC., a Texas Corporation, GREEN VALLEY ACRES, INC., II, a Texas Corporation, SYDNEY GROSS and EDWIN KRITZLER,
*Petitioners,*

vs.

FEDERAL TRADE COMMISSION,
*Respondent.*

## OPINION

Petition to Review an Order of the Federal Trade Commission

Argued and Submitted December 9, 1985
San Francisco, California

Before: WRIGHT, KENNEDY and BEEZER, Circuit Judges.

BEEZER, Circuit Judge:

Petitioners Southwest Sunsites, Inc. ("SWS"), Green Valley Acres, Inc. ("GVA"), Green Valley Acres, Inc. II ("GVA II"), Sidney Gross, and Edwin Kritzler, appeal the Federal Trade Commission's finding that their representations and failures to disclose, in connection with the sale of rural, undeveloped land, violated the Federal Trade Commission Act,

15 U.S.C. § 45(a) (1982). Petitioners contend that application of a new deception standard violates their due process rights and the Administrative Procedures Act, that ex parte communications require reversal, that there is no substantial evidence to support the findings, and that the order is overly broad. We affirm.

## FACTS

Petitioners SWS, GVA, and GVA II are land sales companies incorporated in Texas with corporate headquarters in California. Petitioners are engaged in the sale of undeveloped rural land in west Texas for use as farms, ranches, homesites, and commercial uses. Sales are primarily to out-of-state purchasers. Petitioner Kritzler is the general manager of each corporation, responsible for day-to-day corporate operations and general policy decisions. Petitioner Gross and members of his family own all the stock in each corporation. Gross was the exclusive sales agent for SWS, GVA and GVA II.

Between 1973 and 1977, petitioners acquired 40,000 acres of undeveloped land in west Texas. Petitioners used both their own employees and independent brokers to sell the land. Petitioners purchased a 17,647 acre tract (Southwest Sunsites) in 1973 at about $27 per acre and sold 5, 10, and 40 acre parcels from that tract for $600.00 to $700.00 per acre. Of the 1800 parcels in the tract, between 1300 and 1595 were sold to the public. Green Valley Acres, consisting of 1200 five-acre parcels, was acquired for about $50.00 per acre in 1976 and sold for $800.00 to $1,200.00 per acre.

The land was marketed through newspaper, television and radio advertisements. Radio and television ads appeared as often as 150 times a week. Petitioners maintained sales offices in Dallas, Houston, Atlanta and, for a brief time, Boston. Staff in the Houston and Dallas offices organized promotional dinners.

Brochures produced by petitioners touted the land as a good safe investment. Buyers were told that the land was a good investment because industrial development was likely.

Oil, rubber, nuclear and uranium interests were all potential developments. Petitioners also represented the land as suitable for homesites, subsistence farms, and non-commercial ranches.

Ultimately 80 percent of the land was sold by Porter Realty, an independent brokerage that worked for petitioners from 1974 until 1978. Porter Realty conducted a nationwide telephone campaign, using scripts approved by petitioners and mailed information packets supplied by petitioners to prospective purchasers.

An "Agents Agreement" with Porter Realty authorized it to solicit sales but forbade both acceptance of sales offers and representations inconsistent with materials supplied by petitioners. Porter Realty distributed an oil map [1] which depicted ownership of parcels near GVA and GVA II by oil interests. Petitioners hired Jeffrey Elfont to contact customers who purchased from Porter Realty and to retract all oil development representations made by Porter Realty. Kritzler testified that he cancelled the contracts and refunded the money of persons who purchased the land as an investment in reliance upon Porter Realty's oil development representations. Some but not all such buyers were contacted.

The FTC lodged a three count complaint contending that petitioners engaged in unfair and deceptive practices in violation of § 5 of the Federal Trade Commission Act. The complaint alleged that petitioners (1) misrepresented that the parcels were a good investment involving little or no financial risk and deceptively failed to disclose material information regarding their financial risk, (2) misrepresented that the land was suitable for residential use, farming, and ranching, and deceptively failed to disclose material information regarding the suitability of the properties for these purposes, and (3) sold land that was of little or no value for the represented purposes and unfairly retained proceeds from the sales. An administrative law judge (ALJ) dismissed the complaint, the Commission reversed and issued a cease and desist order, from which petitioners timely appeal.

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[1] The Commission found that petitioners acquiesced in Porter's distribution of the map to prospective purchasers.

## ANALYSIS

**Standard of Review**

The Commission's factual findings are conclusive if supported by evidence sufficient to permit a reasonable mind to accept the Commission's conclusion. *Litton Industries, Inc. v. FTC*, 676 F.2d 364, 368 (9th Cir. 1982).

I. The Deception Standard

The ALJ dismissed the complaint under the deception standard that "any advertising representation that has the *tendency and capacity* to mislead or deceive a prospective purchaser is an unfair and deceptive practice." The Commission applied a "new" standard: "[T]he Commission will find deception if there is a representation, omission or practice that is *likely* to mislead the consumer acting *reasonably* in the circumstances, to the consumer's detriment." [2]

Petitioners contend that application of the new deception standard violated the Administrative Procedures Act (APA), 5 U.S.C. § 554 (b) which requires that they be "timely informed of the matters of fact and law asserted." 5 U.S.C. § 554(b)(3). Petitioners also contend that their due process rights were violated because the Commission "based its decision on a new theory of deception that was significantly different from the one litigated by the parties."

The purpose of the notice requirement in the Administrative Procedures Act is satisfied, and there is no due process violation, if the party proceeded against "understood the issue" and "was afforded full opportunity" to justify his conduct. *Golden Grain Macaroni Co. v. FTC*, 472 F.2d 882, 885 (9th Cir. 1972), *cert. denied*, 412 U.S. 918 (1973).[3]

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[2] The new standard became binding on the FTC when it was adopted in *Cliffdale Associates, Inc.*, 3 CCH Trade Reg. Rep. ¶ 22,137 (1984); *Amrep Corp. v. FTC*, 768 F.2d 1171, 1179 (10th Cir. 1985).

[3] In *Golden Grain Macaroni Company v. FTC*, we held that neither the APA nor due process was violated when the complaint charged defendants with violation of § 2 of the Sherman Act (monopolization and attempt to monopolize), but they were found to have violated § 7 of the Clayton Act (making an acquisition where the effect may substantially lessen competition

*(footnote continues)*

Each of the three elements of the new standard challenged by petitioner imposes a greater burden of proof on the FTC to show a violation of Section 5. First, the FTC must show probable, not possible, deception ("*likely* to mislead," not "*tendency and capacity* to mislead"). Second, the FTC must show potential deception of "consumers acting reasonably in the circumstances," not just any consumers. Third, the new standard considers as material only deceptions that are likely to cause injury to a reasonable relying consumer, whereas the old standard reached deceptions that a consumer might have considered important, whether or not there was reliance.

The Commission reversed the ALJ's findings on a theory more narrow than, but completely subsumed in, the prior theory. All evidence relevant to the old theory was necessarily relevant to the new. We cannot accept petitioners' argument that a "substantially different standard was applied, to which [they] had no opportunity to respond." This is not a case in which it was "readily apparent that different defenses and proofs would be used in defending against . . . two theories" of liability." *Bendix Corp. v. FTC*, 450 F.2d 534, 541 (6th Cir. 1971). The Commission did not violate the APA or the petitioners' due process rights.

## II. Ex Parte Communications

Petitioners contend that the complaint should be dismissed because complaint counsel gave the Commission four written memoranda during adjudication of petitioners' case and was dilatory in placing copies in the public record.[4] The memo-

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*(footnote continued)*

or may tend to create monopoly). We found that petitioner had understood the issue and was afforded an opportunity to defend where, despite obvious differences between Sherman Act and Clayton Act standards, the same facts were pertinent to both theories.

But when each theory is based upon different assertions of fact, the Commission violates the APA if it finds respondent liable under a theory not raised before the ALJ. *Bendix Corporation v. FTC*, 450 F.2d 534, 541 (6th Cir. 1971).

[4] The ex parte communications consist of a staff memorandum ("Buenger/Perkins II), a transmittal memorandum from the Deputy Director of the

*(footnote continues)*

randa concerned consent agreement negotiations between the agency and petitioners' co-respondents, Porter Realty and Irvin Porter. Agency regulations explicitly permit internal communication concerning consent settlements. 16 C.F.R. § 4.7(f) (1985). To the extent that such communication relates to a fact in issue in an ongoing adjudication, "such portion will be placed in the docket binder of the proceeding to which it pertains." *Id.* The regulations do not specify the time within which that must be done, but require that all adjudicative proceedings of the FTC be conducted "expeditiously." 16 C.F.R. § 3.1 (1985). The proposed consent agreement and recommendations were forwarded to the Secretary on April 19, 1983, but were not placed on the record until August of 1984.

Ex parte communications do not void an agency decision. *PATCO v. FLRA*, 685 F.2d 547 (D.C. Cir. 1982). The agency decision is voidable and the court will consider whether "the agency's decisionmaking process was irrevocably tainted so as to make the ultimate judgment of the agency unfair, either to an innocent party or to the public interest that the agency is obliged to protect." *Id.* at 564. Relevant considerations are the gravity of the ex parte communication, whether the communication may have influenced the decision, whether the party making the communication benefited from the decision, whether opposing parties knew of the communication and had an opportunity to rebut, and whether vacation and remand of the decision would serve a useful purpose. *Id.* The court is concerned primarily with the integrity of the process and the fairness of the result rather than adherence to mechanistic rules. *Id.*

Petitioners allegation must overcome a presumption of honesty and integrity on the part of the Commission, and thus a presumption that the decision rests on proper grounds. *Porter*

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*(footnote continued)*

Bureau of Consumer Protection, and a one sentence transmittal memorandum from the Deputy Director.

Petitioners also count Buenger/Perkins I, a document reviewed by the Bureau of Consumer Protection but never transmitted to the Commission. Buenger/Perkins I also concerns the settlement agreement and, like the other memoranda, was a "protected" communication under agency rules.

*County Chapter v. Nuclear Regulatory Commission*, 606 F.2d 1363, 1371 (D.C. Cir. 1979). The communications here were expressly permitted by agency regulations and disclosure was made to petitioners as required by the regulations. 16 C.F.R. § 4.7 (1985). Although the disclosure was not prompt, petitioners had an opportunity to respond to the documents. The ex parte communications here did not invalidate the Commission's proceedings.

**III. Substantial Evidence**

When the agency and ALJ agree, the appellate court will not reverse the ALJ's credibility findings unless they are "inherently incredible or patently unreasonable." *NLRB v. Anthony Co.*, 557 F.2d 692, 695 (9th Cir. 1977); *United Association of Journeymen, Local Union No. 575 v. NLRB*, 553 F.2d 1202, 1205 (9th Cir. 1977).

When the agency and the ALJ disagree, findings of an ALJ are merely part of the record before the agency. *NLRB v. Brooks Camera, Inc.*, 691 F.2d 912, 915 (9th Cir. 1982). The court's deference is to the agency determination, not that of the ALJ. *Stamper v. Secretary of Agriculture*, 722 F.2d 1483, 1486 (9th Cir. 1984); *Loomis Courier Service Inc. v. NLRB*, 595 F.2d 491, 495 (9th Cir. 1979).

Petitioners argue that the following Commission findings are based upon insufficient evidence and/or unwarranted reversals of the judge's credibility findings:

1. that petitioners' employees made oral representations concerning the land's investment potential;

2. that the land is not suitable for residential use, small-scale farming, or ranching;

3. that the land has little value for any of the represented uses;

4. that petitioners' brokers had actual and apparent authority to make representations concerning oil-related development,

5. that Gross and Kritzler personally participated in and approved of the unlawful practices.

**Oral Representations by In-House Staff (Count I)**

In analyzing Count I, the ALJ considered whether petitioners had represented the land as a "risk-free" investment and found by a preponderance of the evidence that they had not. The Commission reversed, holding that Count I did not require proof of a representation that profits were guaranteed. The Commission concluded that the ALJ had failed to consider the "net impression communicated to consumers" through petitioners' written and oral representations.

The Commission identified three types of misleading representations about the land as a good or low risk investment:

> "(1) general assurances that land, and therefore this land in particular, is a good investment and a good way to make money;
>
> (2) specific assurances that profits on this land could be realized in a short time frame, that purchasers could expect to double or triple their money, and that no loss would be suffered; and
>
> (3) descriptions of oil and gas activity and other potential developments in the area, as well as recitals of residential, farming, and ranching uses for the land, that conveyed the representation that the land was a good investment".

The Commission based these findings on promotional materials composed by petitioners and upon the testimony of witnesses. The Commission's findings were not based upon redeterminations of the ALJ's credibility findings and are supported by substantial evidence.

**Suitability of the Land for Use as a Homesite, Farm, or Ranch (Count II)**

The Commission, ALJ, and the parties agree that petitioners represented the land as suitable for use as a homesite, farm, or ranch.

The ALJ found those representations not deceptive because there were "no insurmountable obstacles" to residential

use, "sufficient information" was provided about utility costs, and the evidence showed the feasibility of limited farm/ranch use.

In contrast, the Commission considered petitioners' failure to disclose substantial development costs in light of their earlier representations of suitability. The Commission found the representations deceptive because they inaccurately portrayed the practical and economic suitability of the land for these uses. The Commission concluded that petitioners "failure to disclose material information needed to correct misimpressions [about development costs] amount[ed] to a misleading practice."

The Commission based these findings on petitioners' acknowledgment, sales materials, and testimony of salesmen and consumers. The Commission also considered evidence about the cost of utilities, the availability of financing, the local market for produce, and the land required for cattle grazing.

The Commission's findings that the representations inaccurately portrayed the land's suitability and failed to disclose development costs, are supported by substantial evidence.

**Value of the Land (Count III)**

The Commission reversed the ALJ's findings on value because the ALJ failed to make findings as to the land's actual market value. The ALJ declined to resolve conflicting testimony as to the value in concluding that the land was not "of little or no value." The Commission found that the land's high cost relative to market value, the "steep development costs," and the risks and limitations attendant to the proposed uses supported its conclusion that the land had little or no value as an investment.

The Commission based its findings in part on the testimony of complaint counsel's expert, Mr. Compere. Although the Commission conceded that the methodologies of both Compere and petitioners' expert were flawed, it accepted Compere's testimony because his valuations properly considered resale values and satisfactorily resolved discrepancies as to prices paid for similarly-sized parcels.

Compere's qualifications as an expert were not challenged by petitioners. Compere's testimony constitutes substantial evidence which supports the Commission's finding as to the land's investment value.

The Commission correctly held that property sold here for a price many times greater than its market value did not meet any sensible definition of investment value.

**Apparent and Actual Authority of Petitioners' Broker**

The Commission found that Porter Realty had both actual and apparent authority to make representations on investment val[illegible] A principal is bound by the acts of his salesperson if those acts are within the scope of his apparent or actual authority, unless the third party has actual notice that the acts are unauthorized. *Goodman v. F.T.C.*, 244 F.2d 584, 592 (9th Cir. 1957).

The ALJ found no apparent authority because "[t]here must come a point where a respondent is permitted to exculpate himself .... [T]he actions taken by respondents to correct the situation ... were sufficient to place respondents beyond the reach of those cases [making them liable for actions of agent]." The Commission reversed, finding that furnishing sales materials for public distribution to Porter Realty, which identified petitioners as sellers, clothed Porter Realty with apparent authority to make investment and other representations.

The Commission considered the telephone scripts and written sales material furnished by petitioners to Porter Realty and the testimony of customers. The Commission noted the close business relationship between petitioners and Porter Realty, which included almost daily telephone conferences. On the basis of this continual communication the Commission rejected the argument that petitioners didn't know of the oil map use.

The Commission found that petitioners' remedial actions, contacting persons who purchased from Porter Realty, instituting a refund policy, and providing "disclaimers" in the fact sheets and sales agreements, were not sufficient to limit Porter Realty's apparent authority.

The Commission found also that Porter Realty had *actual* authority through the Agents Agreement to make investment-related representations not in conflict with written material produced by petitioners. Porter Realty was free to make representations on subjects not mentioned in the written material. The Commission found that Porter Realty made misrepresentations about the land that were not in conflict with the Agents Agreement, especially the investment value and the extent and significance of nearby oil and gas activity.

We conclude that substantial evidence supports the Commission's findings that petitioner violated Section 5 through the misrepresentations committed by agents whom they vested with actual and apparent authority. This finding was not based on a reversal of the ALJ's credibility determinations.

**Individual Liability**

The FTC order bound Gross and Kritzler in their individual capacities. Gross and Kritzler argue that the Commission did not have substantial evidence on which to base its finding that they participated in and approved of the unlawful practices and that the Commission substituted its credibility findings for those of the administrative law judge. Gross and Kritzler selected the properties to be purchased and the prices to be charged, decided upon the deceptive content, promotional materials, commercials, and sales contracts. They prepared or approved television and radio advertisements containing deceptive representations.

The ALJ did not explicitly address individual responsibility. Because he found no violation of the FTC Act, he did not apportion responsibility. Therefore, he made no credibility findings to which the agency or this court should defer. Substantial evidence supports the Commission's finding of individual responsibility based on their managerial and policy-making responsibilities.

## IV. The Order

Petitioners argue that the Commission's order, which required disclosure to past as well as future buyers, exceeds the agency's authority.

The Commission has broad remedial power and a remedial order should be upheld if reasonably related to the unlawful practices found to exist. *Chrysler Corp. v. FTC*, 561 F.2d 357, 364 (D.C. Cir. 1977).

Orders requiring affirmative disclosures and corrective advertising are clearly within the agency's power. *Amrep Corp. v. FTC*, 768 F.2d 1171, 1180 (9th Cir. 1985). These corrective orders do not constitute retroactive private relief. *Heater v. FTC*, 503 F.2d 321 (9th Cir. 1974). Nor is this an instance of enjoining past violations which are unlikely to recur. *FTC v. Evans Products Co.*, 775 F.2d 1084 (9th Cir. 1985).

## CONCLUSION

The Commission is AFFIRMED.

Supreme Court, U.S.
FILED
JUL 15 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-2142

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

SOUTHWEST SUNSITES, INC.,
GREEN VALLEY ACRES, INC., a Texas Corporation,
GREEN VALLEY ACRES, INC., II, a Texas Corporation,
SYDNEY GROSS and EDWIN KRITZLER,
*Petitioners,*

vs.

FEDERAL TRADE COMMISSION,
*Respondent.*

## SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

GLENN A. MITCHELL
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Green Valley Acres, Inc.
Green Valley Acres, Inc., II
Sydney Gross
Edwin Kritzler

12918

**UNITED STATES OF AMERICA**
**BEFORE FEDERAL TRADE COMMISSION**

COMMISSIONERS: JAMES C. MILLER, III
PATRICIA P. BAILEY
GEORGE W. DOUGLAS
TERRY CALVANI
MARY L. AZCUENAGA

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**DOCKET NO. 9134**

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In the Matter of

SOUTHWEST SUNSITES, INC., GREEN VALLEY ACRES, INC., GREEN VALLEY ACRES, INC. II, corporations, and

SYDNEY GROSS and EDWIN KRITZLER, individually and as officers or former officers of said corporations,

PORTER REALTY, INC., a corporation, and IRVIN PORTER, individually and as an officer or former officer of said corporation.

---

## FINAL ORDER

This matter has been heard by the Commission upon the appeal of complaint counsel and upon briefs and oral argument in support of and in opposition to the appeal. The Commission, for reasons stated in the accompanying opinion, has granted a portion of complaint counsel's appeal. Therefore,

IT IS ORDERED that the initial decision of the administrative law judge be adopted as the findings of fact and conclusions of law of the Commission except as modified by the accompanying opinion. Other findings of fact and conclusions of law of the Commission are contained in the accompanying opinion.

IT IS FURTHER ORDERED that the following Order to Cease and Desist be entered:

## ORDER

As used in this Order, the following definitions shall apply:

(A) "Respondents" means any of the corporate respondents, Southwest Sunsites, Inc., Green Valley Acres, Inc., and Green Valley Acres, Inc. II, their successors and assigns, and their officers, directors, representatives, and employees; any of the individual respondents, Sydney Gross and Edwin Kritzler; and any corporation, subsidiary, division, agent, or other device through which any corporate or individual respondent acts.

(B) "Land," "property," or "lot" means any real property unimproved by a commercial or residential building sold or offered for sale by respondents.

(C) "Purchaser" or "buyer" means any individual who is a potential or actual vendee of the land offered for sale or sold by respondents.

(D) "Commission" means the Federal Trade Commission and/or its duly authorized representatives and employees.

(E) "Homesite" means any lot in which (1) potable water is available at a reasonable cost, (2) the lot is suitable for a septic tank or there is reasonable assurance that the lot can be served by a central sewage system, (3) the lot is legally accessible, and (4) the lot is free from periodic flooding.

### I

IT IS ORDERED that respondents Southwest Sunsites, Inc., Green Valley Acres, Inc., and Green Valley Acres, Inc. II, corporations, their successors and assigns, and their officers, representatives, and employees, and Sydney Gross and Edwin Kritzler, individually and as officers or former officers of said corporations, directly or through any corporation, subsidiary, division, agent or other device, in connection with the advertising, marketing, offering for sale, sale, or inducement of payments for land, in or affecting commerce, as commerce is

defined in the Federal Trade Commission Act, as amended shall forthwith cease and desist from:

A. Representing, directly or by implication, through the use of any means, that:

1. The purchase of any land has been, is, or will be a good, profitable, short-term, safe, or sound financial investment;

2. There has been, is, or will be little or no financial risk involved in the purchase of any land;

3. The resale of any land is not or will not be difficult, or such land can be or has been resold within a certain time;

4. The purchase of any land is a way to achieve financial security or self-sufficiency, to deal with inflation, or to make money;

5. The value of, or demand for, any land has increased, is increasing, or will increase;

6. Purchasing any interest in land will result in any economic benefit to the purchaser, including but not limited to a benefit resulting from an increase in the value of the land from its use or development for any purpose, or as a result of mineral rights, exploration, or extraction; the land's profitable resale; the provision of a hedge against inflation; or the receipt of income or reduction of expenses from growing any crop, raising any animal, or any other source;

7. Any land is suitable for use as a homesite, farm, or ranch, for personal or commercial purposes;

unless such representation is not misleading and unless, at the time such representation is made, respondents possess and rely upon competent and reliable evidence which substantiates the representation, including, at a minimum, (a) data sufficient to demonstrate that the typical owner of such land is likely to achieve the results represented, and (b) where the representation predicts or projects future occurrences, evidence that would

generally be accepted by the community of experts qualified to make such representations as providing a reasonable basis for the projection.

B. Failing to maintain evidence in support of and upon which respondents rely in making any representation about the value, suitability, or use of land, including evidence substantiating the representations described in Paragraph I.A., such evidence to be retained for three years from the date of respondents' last use of such representation and to be furnished to the Commission upon request.

C. Representing, directly or by implication, through the use of any means, that any land is currently usable as a homesite, farm, or ranch, unless such land is immediately usable for such purpose without any substantial improvement or development by the purchaser.

D. Misrepresenting in any manner:

1. The cost of obtaining or availability of electric power, telephone service, potable water, sewage disposal, or any utility;

2. The past, present, planned, proposed or potential purchase, use, or development of any interest in land by respondents or any other party;

3. The extent, location, value, nature, or significance of any actual or potential mineral right or resource or any activity related thereto.

## II

IT IS FURTHER ORDERED that respondents, in connection with the advertising, marketing, offering for sale, or sale of land in or affecting commerce, as commerce is defined in the Federal Trade Commission Act, as amended, shall:

A. Prepare a "Fact Sheet for Buyers" containing only such information as is set forth or referred to in Attachment A to this

Order (incorporated herein by reference), and distribute to all purchasers a copy of the Fact Sheet in the following manner:

1. If respondents invite the purchaser by mail to attend a meeting sponsored by respondents, respondents shall include the Fact Sheet with the invitation;

2. If respondents arrange to meet with the purchaser in his or her home or other location, respondents shall mail the Fact Sheet to the purchaser, allowing sufficient time for the Fact Sheet to arrive at least two days prior to the meeting;

3. If the initial contact with the purchaser is in person (for example, at a booth located in a public place), respondents shall, after identifying briefly the purpose of the contact, give the Fact Sheet to the purchaser, request that he or she read it, and provide ample uninterrupted time for it to be read completely before continuing with any sales presentation;

4. If the initial contact is by telephone or the sale is to be completed entirely through the mail, the Fact Sheet shall accompany the initial mailing to the purchaser.

B. Honor any purchaser's request to rescind the contract and recover all payments thereunder at the purchaser's option, if respondents fail to distribute a copy of the Fact Sheet to such purchaser as required by Paragraph II.A., provided that the purchaser makes such request within thirty days after receiving a copy of the Fact Sheet.

C. Refrain from misrepresenting any information in the Fact Sheet.

D. Refrain from making any representation, directly or by implication, through the use of any means, about:

1. The present, planned, proposed, or potential development, improvement, or facilities of the land or of the subdivision or project in which the land is located where such representation differs in any material respect from the information contained in the Fact Sheet or the

Property Report required by the Interstate Land Sales Full Disclosure Act and related regulations, 15 U.S.C. §§ 1701 to 1720 (1982); 24 C.F.R. §§ 1700.1 et seq. (1983);

2. The respondents' or purchasers' rights or obligations where such representation differs in any material respect from the parties' rights or obligations as stated in the contract, the Fact Sheet, or the Property Report required by the Interstate Land Sales Full Disclosure Act and related regulations.

## III

IT IS FURTHER ORDERED that respondents, in connection with the advertising, marketing, offering for sale, or sale of land in or affecting commerce as commerce is defined in the Federal Trade Commission Act, as amended, shall:

A. Disclose clearly and prominently in every written promotional material, magazine or newspaper advertisement greater than one-quarter page, and oral sales presentation the following statements:

1. THE FUTURE VALUE OF LAND IS UNCERTAIN. THESE LOTS ARE NOT BEING SOLD AS A FINANCIAL INVESTMENT. YOU SHOULD NOT COUNT ON YOUR LOT RISING IN VALUE OR YOUR BEING ABLE TO RESELL IT. DISCUSS ANY POSSIBLE PURCHASE WITH A QUALIFIED PROFESSIONAL.

2. THESE LOTS MAY BE SUITABLE FOR USE ONLY WITH SUBSTANTIAL EXPENDITURES FOR THE EXTENSION OF UTILITIES, WATER, AND OTHER NECESSITIES. THESE EXPENDITURES VARY DEPENDING ON THE LOCATION OF THE LOT AND COULD BE SO GREAT AS TO MAKE USE OF THE LAND IMPRACTICAL.

B. Disclose clearly and prominently in every radio advertisement, television advertisement, and magazine or newspaper advertisement of one-quarter page or less the following statement:

> REMEMBER—BUYING LAND MAY BE RISKY. CONSULT A QUALIFIED PROFESSIONAL BEFORE BUYING.

C. Include clearly and prominently, immediately preceding the space provided for the purchaser's signature in each contract for the sale of land, the following statement in 12-point boldface type:

**SEVEN DAY RIGHT TO CANCEL**

> YOU HAVE THE RIGHT TO CANCEL YOUR CONTRACT, WITHOUT ANY PENALTY OR OBLIGATION, AT ANY TIME UNTIL MIDNIGHT OF THE SEVENTH DAY AFTER YOU SIGN THIS CONTRACT. SEE THE ATTACHED "RIGHT OF CANCELLATION" FOR AN EXPLANATION OF THIS RIGHT.
>
> IF YOU CHOOSE TO CANCEL WITHIN THIS TIME, ANY PAYMENT YOU MADE UNDER THIS CONTRACT WILL BE REFUNDED AND ANY DOCUMENT YOU SIGNED WILL BE CANCELLED AND RETURNED WITHIN THIRTY DAYS AFTER THE SELLER RECEIVES YOUR CANCELLATION NOTICE.
> **ATTENTION:** ALTHOUGH YOU HAVE SEVEN DAYS IN WHICH TO RECONSIDER YOUR DECISION AND CANCEL THIS CONTRACT WITH FULL REFUND, WE RECOMMEND THAT, **BEFORE SIGNING,** YOU CONSIDER YOUR NEEDS CAREFULLY AND HAVE THIS CONTRACT AND THE ATTACHED NOTICE TO BUYERS REVIEWED BY A QUALIFIED PROFESSIONAL.

D. Furnish each purchaser, at or before the time the purchaser signs a contract for the sale of land, with two copies

of a form, containing only such information as is set forth or referred to in Attachment B to this Order (incorporated herein by reference), captioned in 12-point boldface type, "RIGHT OF CANCELLATION," and with all other writing in 10-point boldface type.

Provided, however, that if respondents fail to distribute the "RIGHT OF CANCELLATION" forms as required by this paragraph, the period during which the purchaser may cancel the contract shall be extended until seven days after the purchaser receives said "RIGHT OF CANCELLATION".

Provided further that during the seven-day cancellation period after a purchaser's signing of a land purchase contract, respondents shall not initiate any contact or communication, personal, telephonic, or otherwise, with such purchaser, but if respondents initiate any such contact, the period during which the purchaser may cancel the contract shall be extended until thirty days after the date of purchase.

E. Honor any signed and timely exercise of a "RIGHT OF CANCELLATION" (or its functional equivalent) by the purchaser, and within thirty days after the receipt of such notice of cancellation, (a) refund all payments made under the contract, and (b) cancel and return any contract or other legal document executed by the purchaser.

F. Refrain from misrepresenting, soliciting, or obtaining any purchaser's assent to or otherwise imposing any condition, waiver, or limitation upon the right of a purchaser to cancel a transaction or receive a refund under any provision of this Order or by any applicable statute or regulation.

## IV

IT IS FURTHER ORDERED THAT respondents shall:

A. Within sixty days of the effective date of this Order, prepare a "Notice to Customers" containing only such information as is set forth or referred to in Attachment C to this Order (incorporated herein by reference), and cause a copy of such Notice to be sent by first class mail, postage prepaid and

address correction requested, to each purchaser of respondents' land in the subdivisions known as Southwest Sunsites, Green Valley Acres, and Green Valley Acres II, at the last known address contained in respondents' files or requested and received from Porter Realty Inc. or Irvin Porter, for each such purchaser.

Provided, however, that if changes are necessary to render the Notice accurate as of the date of mailing, respondents shall submit such changes to the Commission not less than thirty days prior to the date of mailing. The Commission, within ten days after its receipt of such changes, shall have the right to reject them in whole or in part, and respondents will then mail copies of such Notice with any changes that the Commission did not reject.

Provided further that whenever a copy of such Notice is returned undelivered, respondents shall, within ten days of the return, make all reasonable efforts, including contacting credit bureaus, telephone and utility companies, county land records, and purchasers' relatives or representatives whose addresses are in respondents' files, to obtain the correct present address of the purchaser whose Notice was not delivered, and respondents shall, within twenty days of obtaining a new address, send a copy of such Notice to the purchaser for whom respondents obtain a new address by these means or otherwise.

B. Maintain, for three years after the effective date of this Order or three years after the last Notice is mailed, whichever occurs last, records adequate to disclose respondents' compliance with Paragraph IV.A., and furnish such records to the Commission upon request.

C. Refrain from seeking to recover, or recovering by any means, from purchasers who were under contract before the date this Order becomes final for the purchase of land at Southwest Sunsites, Green Valley Acres, and Green Valley Acres II, and who have defaulted or who become in default, any sums remaining due on their contracts.

V

IT IS FURTHER ORDERED that respondents shall:

A. Forthwith deliver by certified mail or in person, a copy of this Order to all present and future sales representatives and other employees, independent brokers, advertising agencies and others who sell or promote the sale of respondents' land or who otherwise have contact with the public on behalf of respondents in connection with the sale of land.

B. Provide each person described in Paragraph V.A. with a form, to be returned to respondents, clearly stating that person's intention to conform his or her sales practices to the requirements of this Order.

C. Inform each person described in Paragraph V.A. that respondents shall not use the services of any such person, unless such person agrees to and does file notice with respondents that he or she will conform his or her practices to the requirements of this Order.

D. In the event such person will not agree to so file notice with respondents and to conform his or her practices to the requirements of this Order, respondents shall not use the services of such person.

E. Inform the persons described in Paragraph V.A. that respondents are obligated by this Order to discontinue dealing with those persons who engage on their own in the acts or practices prohibited by this Order, or who fail to adhere to the affirmative requirements of this Order.

F. Institute a reasonable program of continuing surveillance adequate to reveal whether the practices of each person described in Paragraph V.A. conform to the requirements of this Order, and promptly investigate and make good faith efforts to resolve any complaints about any such person received by respondents, and maintain records of any such complaint, investigation, and disposition of the complaint for ten years from the date of the complaint, such records to be furnished to the Commission upon request.

G. Discontinue dealing with any person described in Paragraph V.A. who more than once engages on his or her own in the acts or practices prohibited by this Order.

H. Forthwith deliver a copy of this Order to each of respondents' subsidiaries.

I. Notify the Commission at least thirty days prior to any proposed change in the corporate respondents, such as dissolution, assignment, reorganization, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation that may affect compliance obligations arising out of this Order.

J. Within sixty days after service upon it of this Order and annually for three years thereafter, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this Order.

By the Commission. Commissioners Calvani and Azcuenaga did not participate.

Emily H. Rock
Secretary

SEAL:

ISSUED: January 15, 1985

## ATTACHMENT A
## FACT SHEET FOR BUYERS

FACT SHEET CONCERNING: _____ (insert name of subdivision)

NAME OF SELLER/AGENT: _____ (insert name of seller and agent)

EFFECTIVE DATE OF NOTICE: _____ (insert date of notice)

### IMPORTANT

YOU ARE ADVISED THAT THE FUTURE VALUE OF LAND IS UNCERTAIN. THESE LOTS ARE NOT BEING SOLD AS A FINANCIAL INVESTMENT. YOU SHOULD NOT COUNT ON YOUR LOT RISING IN VALUE OR YOUR BEING ABLE TO RESELL IT. IF YOU OFFER YOUR LOT FOR SALE, YOU MAY FACE THE COMPETITION OF THE SELLER'S OWN SALES PROGRAM, WHICH MAY INVOLVE AN EXTENSIVE SALES CAMPAIGN. REAL ESTATE BROKERS ALSO MAY NOT BE INTERESTED IN SELLING YOUR LOT OR LISTING IT FOR SALE.

YOU ARE ALSO ADVISED THAT THESE LOTS MAY BE SUITABLE FOR USE ONLY WITH SUBSTANTIAL EXPENDITURES FOR THE EXTENSION OF UTILITIES, WATER, AND OTHER NECESSITIES. THESE EXPENDITURES VARY DEPENDING ON THE LOCATION OF THE LOT AND COULD BE SO GREAT AS TO MAKE USE OF THE LAND IMPRACTICAL.

AS OF THE DATE OF THIS FACT SHEET, THE SELLER HAS SOLD _____ (insert number) LOTS IN _____ (insert name of subdivision). _____ (insert number) LOTS REMAIN UNSOLD AND AVAILABLE FOR SALE.

(In connection with any land for which federal property reports are *not* provided as required by the Interstate Land Sales Full Disclosure Act and related regulations, 15 U.S.C. §§ 1701 to

1720 (1982), 24 C.F.R. §§ 1700.1 et seq. (1983), provide the following information:)

THIS FACT SHEET PROVIDES IMPORTANT INFORMATION ABOUT THE VALUE OF THESE LOTS AND THE AVAILABILITY AND ESTIMATED COSTS TO YOU OF UTILITIES, WATER, AND OTHER NECESSITIES.

## WATER

(Provide the following information regarding water service:

(a) the method of water service to be used;

(b) if individual wells are to be used: whether the seller is responsible for installing such wells; whether evidence exists that water can be found under every lot offered for sale; the estimated depth at which water can be found in the applicable area; the estimated cost of drilling a well for household purposes and for agricultural purposes if agricultural use is feasible; and whether and under what conditions a refund or exchange will be offered in the event a productive well cannot be installed;

(c) if water is to be provided by a central system: who is responsible for constructing such a system; the estimated amount of any construction costs or any connection or use fees to be paid by the purchaser, including the estimated cost of installing water mains to either the most remote lot in the subdivision or the lot the prospective purchaser is considering purchasing; the estimated service availability date of the water system; and, if the seller is responsible for constructing the system, whether a separate account or fund has been established to finance such construction and the extent of construction completed as of the date of the Fact Sheet.)

## SEWER SERVICE

(Provide the following information about sewer service:

(a) the method of sewage disposal to be used;

(b) if sewage disposal is to be by septic tank or other individual system: whether the seller is responsible for installing the system; the estimated cost of the system; whether a permit is required for such a system; and whether and under what conditions a refund or exchange will be offered if the purchaser is unable to install a septic tank or other on-site sewage system;

(c) if sewage disposal is to be by a central treatment and collection system: who is responsible for constructing such a system; the estimated amount of any construction costs or any connection or use fees to be paid by the purchaser; the estimated service availability date of the system; and, if the seller is responsible for constructing the system, whether a separate account or fund has been established to finance such construction and the extent of construction completed as of the date of the Fact Sheet.)

## ELECTRIC SERVICE

(Provide the following information about electric service:

(a) whether primary service lines have been extended in front of, or adjacent to, each lot;

(b) if not, the utility company's policy and charges for extension of primary lines, and the estimated cost for extending primary service to either the most remote lot in the subdivision or the specific lot the prospective purchaser is considering purchasing.)

## TELEPHONE SERVICE

(Provide the following information about telephone service:

(a) whether primary service lines have been extended in front of, or adjacent to, each lot;

(b) if not, the utility company's policy and charges for extension of primary lines, and the estimated cost for

extending primary service to either the most remote lot in the subdivision or the specific lot the prospective purchaser is considering purchasing.)

**IMPORTANT.** BEFORE SIGNING ANY DOCUMENT, OBTAIN AND READ THOROUGHLY THE CONTRACT AND THIS FACT SHEET. IT IS DESIRABLE TO HAVE A QUALIFIED PROFESSIONAL EVALUATE THE TERMS OR MERITS OF THIS PURCHASE **BEFORE** YOU SIGN ANYTHING.

(In connection with any land for which federal property reports *are* provided as required by the Interstate Land Sales Full Disclosure Act and related regulations, 15 U.S.C. §§ 1701 TO 1720 (1982), 24 C.F.R. §§ 1700.1 et seq. (1983), provide the following information:)

**IMPORTANT:** BEFORE SIGNING ANY DOCUMENT, OBTAIN AND READ THOROUGHLY EACH PROPERTY REPORT AND CONTRACT. THE PROPERTY REPORT CONTAINS ADDITIONAL INFORMATION THAT YOU SHOULD KNOW AND UNDERSTAND BEFORE YOU SIGN A CONTRACT TO BUY THIS LAND. IT IS DESIRABLE TO HAVE A QUALIFIED PROFESSIONAL EVALUATE THE TERMS OR MERITS OF THIS PURCHASE **BEFORE** YOU SIGN ANYTHING.

## ATTACHMENT B
## RIGHT OF CANCELLATION

(insert date purchaser signed the contract)

_____

Date of Transaction

(insert lot identification information)

_____

Lot Identification

YOU HAVE THE RIGHT TO CANCEL YOUR CONTRACT, WITHOUT ANY PENALTY OR OBLIGATION, AT ANY TIME UNTIL MIDNIGHT OF THE SEVENTH DAY AFTER YOU SIGN THE CONTRACT. YOU SHOULD USE THIS TIME TO EXAMINE WITH CARE THIS CONTRACT AND THE FACT SHEET OR PROPERTY REPORT. WE ALSO RECOMMEND THAT YOU HAVE THIS CONTRACT AND OTHER INFORMATION ABOUT THE PROPERTY REVIEWED BY A QUALIFIED PROFESSIONAL.

NO REPRESENTATIVE OF THE SELLER SHOULD CONTACT YOU IN ANY WAY DURING THIS SEVEN DAY PERIOD. IF, HOWEVER, THE SELLER OR ITS REPRESENTATIVE CONTACTS YOU DURING THIS SEVEN-DAY PERIOD, YOU MAY CANCEL THE PURCHASE BY NOTIFYING THE SELLER BY MIDNIGHT OF THE THIRTIETH DAY AFTER THE DATE OF PURCHASE.

IF YOU CANCEL WITHIN THIS TIME, ANY PAYMENTS YOU MADE UNDER THE CONTRACT WILL BE REFUNDED AND ANY DOCUMENT YOU SIGNED WILL BE CANCELLED AND RETURNED WITHIN THIRTY DAYS AFTER THE SELLER RECEIVES YOUR CANCELLATION NOTICE.

TO CANCEL THE TRANSACTION, MAIL OR DELIVER A SIGNED COPY OF THIS CANCELLATION NOTICE, OR ANY OTHER WRITTEN NOTICE OR TELEGRAM STATING YOU ARE EXERCISING YOUR RIGHT TO CANCEL, TO (insert name of seller), AT (insert address of seller's place

of business) POSTMARKED (if mailed) OR FILED FOR TRANSMISSION (if telegraphed) NOT LATER THAN MIDNIGHT OF (insert date not earlier than the seventh day following the date the purchaser signed the contract).

I (WE) HEREBY CANCEL THIS TRANSACTION. (EACH BUYER MUST SIGN THIS NOTICE).

_____

(Date)

_____ _____

(Buyer's signature) (Buyer's signature)

## ATTACHMENT C

## IMPORTANT NOTICE TO CUSTOMERS OF SOUTHWEST SUNSITES, GREEN VALLEY ACRES, AND GREEN VALLEY ACRES II

This letter is being sent to all customers of Southwest Sunsites, Green Valley Acres, and Green Valley Acres II who purchased land in these subdivisions. It contains information you should know about your lot.

In 1980, the Federal Trade Commission began a lawsuit against Southwest Sunsites, Green Valley Acres, and Green Valley Acres II (respondents). The Commission recently decided that case. In its decision, the Commission concluded that respondents made unfair and deceptive claims about the benefits of purchasing their land as an investment or for use as a homesite, ranch or farm. This letter is being sent as a part of the Order issued when the lawsuit was decided.

Please read this letter, consult with an attorney or other qualified professional, and think about your alternatives carefully. We cannot advise you as to what decision is best for you.

### I. *Lot Value and Resale*

The future value of land is uncertain. You should not assume that your lot will rise in value or that you will be able to resell it. In fact, the approximate fair market value of your land was only $70 to $110 per acre in 1980. Most land in the Van Horn area, where your land is located, is normally sold in considerably larger tracts than the lot you bought. You may find it very difficult and prohibitively expensive to farm or ranch on your land because of its relatively small size.

Furthermore, there is no certainty that there is or will be in the near future any significant commercial or industrial activity or developments in the Van Horn area that will cause your land to be more valuable. The presence of large ranches and farms near your property has not affected the value of your lot. Development of the surrounding area you may have heard about (for example, construction of a power plant) has not

occurred. There has not been and there presently is no significant oil activity on the land in these subdivisions or in surrounding areas.

You may have difficulty selling your lot or listing it for sale. In fact, real estate agents in the Van Horn area will not list properties in Southwest Sunsites, Green Valley Acres, and Green Valley Acres II. Local banks and savings institutions will not use these properties as collateral on loans.

**II. Use of Lots**

You should also know that these lots may be suitable for use only with substantial expenditures or money for the extension of utilities, water, and other necessities. These expenditures vary depending on the location of the lot and could be so great as to make use of the land impractical.

A. *Water:* The source of domestic water for the property is from individual wells drilled by the owner at his or her expense. While the cost of drilling a well varies depending on the driller and depth of the water table, the cost for a well for household purposes is likely to be between $5,000 and $10,000, and the cost of a well for irrigation can be $10,000 to $20,000. It may be necessary to drill 400 feet or more in order to have sufficient reserves from which to pump.

B. *Sewage Disposal:* Sewage disposal is by use of individual septic tanks which cost approximately $1,000.

C. *Electricity:* Electric power is available from local electric companies, but lines have not been extended to individual lots. According to representatives of the electric company in the area, the current cost for extension lines is 75 cents per foot after the first ¼ mile, which is free. Some lots are as much as two miles from existing lines. Thus, it may cost you many thousands of dollars to obtain electric service.

D. *Telephone:* Telephone service is available, but lines have not been extended to individual lots. According to representatives of the telephone company in the area, the current line extension charge is 50 cents per foot after the first ½ mile, which is free if it is public land or public easement. Some

lots are as much as two miles from existing lines. Thus, it may cost you many thousands of dollars to install a telephone.

E. *Golf Course:* The golf course owned by Southwest Sunsites Property Owners Association was never completely built and is not currently being maintained.

F. *Use of Lots:* Very few purchasers live in Southwest Sunsites, Green Valley Acres, and Green Valley Acres II. Most of these live in mobile homes. A few purchasers have gardens. There are no commercial farms or ranches and no commercial development on the lots, except on company-owned sites.

**III. Options Available to Purchasers**

The Federal Trade Commission may decide to bring another lawsuit against respondents to seek refunds or other relief for buyers. It is uncertain whether such an action will begin, when it will end, whether it will be successful, or the effect it will have on any buyer. It may be several years before we know the answers to these questions.

Several options are available to you. You may continue to make payments. You may refuse to make any further payments. The Commission's order prohibits respondents from making you pay any more money but if you stop your payments you may lose your land and all of the money you have paid. You may stop making payments and seek satisfaction against respondents in a private lawsuit. The Commission's Order may be relevant in such a suit. You should consult an attorney or other qualified professional before making your decision.

## OPINION OF THE COMMISSION

**BY BAILEY, *Commissioner:***

This matter comes before the Commission on complaint counsel's appeal of the Administrative Law Judge's order dismissing the complaint. Because we find sufficient evidence that respondents misrepresented the investment value and potential uses of the land they sold and failed to disclose to consumers material facts about its investment value and suitability for use, we conclude that respondents violated Section 5 of the Federal Trade Commission Act. Thus we decline to adopt the ALJ's order dismissing the complaint and issue instead this opinion and the attached Order. This opinion is the product of the Commission's independent consideration of the entire record in this case, including the transcripts of testimony, exhibits, pleadings, briefs, and the Initial Decision. The opinion contains findings of fact and conclusions of law that the Commission believes are supported by its review of the record as a whole. Where it is inconsistent with the findings and conclusions contained in this opinion, the Initial Decision is hereby set aside. The Order issued against respondents consists of those provisions deemed necessary to prohibit respondents from engaging in the misrepresentations and omissions of fact identified here and to deter respondents from similar unfair or deceptive practices in connection with any future land sales.

A summary of the Commission's proceedings and of respondents' operation and marketing approach is presented in Section I. In Section II, we focus on the practices alleged in the complaint to be unfair and deceptive as we discuss respondents' investment and land use representations and compare those representations to the record evidence about the land's investment value and suitability for various uses. This section also addresses the existence of certain material information about the land that was not disclosed to prospective purchasers. The legality of respondents' representations and omissions of fact is considered in Section III, where we discuss respondents' liability under the FTC Act for practices they pursued directly and through agents hired to sell land on their behalf. The nature and scope of the Order entered against respondents is described in Section IV.

## I. BACKGROUND

### A. THE COMMISSION'S PROCEEDINGS

This proceeding involves three corporate and two individual respondents.[1] Respondents Southwest Sunsites, Inc. ("SWS"), Green Valley Acres, Inc. ("GVA") and Green Valley Acres, Inc. II ("GVA II"), are land sales companies incorporated under the laws of the State of Texas. Their corporate headquarters are in California. Individual respondent Edwin Kritzler is the general manager of each of the three corporate respondents, is a vice president and director of SWS, and is responsible for the day-to-day operation of the corporate respondents as well as for general policy decisions. (ID 8)[2] The other individual respondent, Sydney Gross, and members of his immediate family own all three corporate respondents. (ID 6) Gross individually and through corporations he formed had the duty to "overlook and oversee" the operations of SWS, GVA, and GVA II, and he was the "exclusive sales agent" for SWS, GVA, and GVA II. (ID 7; Gross Tr. 296, 322-24) The overlapping ownership and management of the three corporations by the individual respondents and their families and the similarity and joint nature of their operation impel us to consider their activities collectively rather than separately.

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[1] Two other respondents were named in the complaint but are no longer included in the proceeding. Respondent Porter Realty, Inc. through its president, respondent Irvin Porter, contracted to sell land for Southwest Sunsites, Green Valley Acres, and Green Valley Acres II, and both were named in the complaint. (ID 10) Pretrial proceedings concerning Irvin Porter and Porter Realty were stayed on February 25, 1981, after a consent agreement was tentatively accepted. The consent agreement is under consideration by the Commission. The term "respondents" as used in this opinion does not include Irvin Porter or Porter Realty.

[2] The following abbreviations will be used in this opinion:

ID—Initial Decision finding number
ID pp.—Initial decision page number
Tr.—Transcript page number
CX—Complaint Counsel's exhibit
RX—Respondents' exhibit
CCAB—Complaint Counsel's appeal brief
RAB—Respondents' appeal brief
CCRB—Complaint Counsel's reply brief
Rec.—Record page number

At the time the Commission's complaint in this proceeding was issued, respondents were in the business of selling to the public undeveloped land in West Texas, in parcels ranging from five to forty acres. Between 1973 and 1977 respondents bought 40,000 acres of land in three tracts in Culberson County, Texas, within 30 miles of Van Horn, Texas, a town of fewer than 3,000 people. Van Horn is located 120 miles east of El Paso. Respondents marketed the parcels to the public primarily by means of agents (termed by respondents "independent brokers") and secondarily by their own sales staff. Approximately 80 percent of the parcels were sold by one broker, Porter Realty, which sold the land throughout the country by telephone solicitation. (ID 45, 47) In all, about 2,600 parcels were sold from 1974 to 1979, at prices ranging from $2,995 to $6,000 for five acres, and up to about $10,000 for forty acres.

The Commission's complaint issued on April 29, 1980, and alleged that respondents' land sales activities violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (1982).[3] In brief, the three counts charged that respondents (1) misrepresented that the parcels sold by respondents were good investments involving little or no financial risk and failed to disclose material information regarding their financial risk; (2) misrepresented that the properties were suitable for use as homesites, farms, and ranches and failed to disclose material

[3] On April 9, 1980, the Commission initiated an action for a preliminary injunction against respondents under FTC Act Section 13(b), 15 U.S.C. § 53(b) (1982), to enjoin alleged violations of the FTC Act. The action was filed in the U.S. District Court for the Northern District of Texas. The District Court issued a preliminary injunction on May 19, 1980, restraining the respondents from further violations of Section 5, but the court declined to grant requested ancillary relief in the form of an order to prohibit respondents from continuing to accept payments on the purchase agreements and from dissipating corporate assets. *FTC v. Southwest Sunsites, Inc.*, No. 3-80-0258-F (N.D. Tex. May 19, 1980). The injunction prohibiting violations of Section 5 was affirmed by the U.S. Court of Appeals for the Fifth Circuit. The Fifth Circuit reversed the district court's conclusion that ancillary relief to freeze corporate assets could not be ordered in a Section 13(b) proceeding, and remanded the case to the District Court to determine the appropriateness of granting the requested ancillary relief. *FTC v. Southwest Sunsites, Inc.*, 665 F.2d 711 (5th Cir.), *cert. denied*, 456 U.S. 973 (1982).

facts regarding the suitability of the properties for those uses; and (3) sold parcels that were of little or no value and unfairly retained the proceeds from the sales.

Adjudicative hearings in this case began in Dallas, Texas, on April 13, 1981, and continued until November 1981 both in Dallas and in Van Horn, Texas, in Albuquerque, New Mexico, and in Washington, D.C. The Administrative Law Judge (ALJ) filed his Initial Decision on July 29, 1982, dismissing the complaint. On Count I, the ALJ determined that while brokers retained by the respondents, primarily Porter Realty, misrepresented the investment value of the subject properties, the respondents themselves were not liable for the misrepresentations because the ALJ believed that the respondents took sufficient action to prevent them. (ID pp. 112-14) The ALJ found that no "insurmountable obstacles" prevented use of the parcels as homesites, and that some individuals were taking "substantial strides towards self-sufficiency by farming or raising small numbers of cattle," so that he found no violation of law under Count II. (ID pp. 114-15) The ALJ also concluded that information relating to the costs of development was disclosed sufficiently to consumers so that no failure to disclose information had been proved under Count II. Finally, with respect to Count III, he determined that the land was not of little or no value, and therefore that retention of money paid for the land was not unfair.

Complaint counsel filed a timely appeal from the Initial Decision and after full briefing of the factual and legal issues on appeal the Commission heard oral argument.

## B. THE LAND

Respondents SWS, GVA, and GVA II all engaged in the marketing and sale, primarily to out-of-state purchasers, of undeveloped land in rural areas in West Texas. The area of Texas within which the land is located is relatively arid, with ten inches of rainfall annually on average. (Holtz Tr. 3035) Respondents' property is near desert in condition. (Drew Tr. 742; W.D. Smith Tr. 911) The predominant use of land in the county in which the subject properties are located is commercial ranching, since most land, including the subject properties, is

covered with native grasses or brush. (Holtz Tr. 3035; Compere Tr. 3241) The subject properties themselves are undeveloped, generally flat land with sparse vegetation and grasses.[4]

In 1973 respondents purchased 17,467 acres of land about 10 to 20 miles east of Van Horn, Texas, that became SWS. Respondents paid $469,857.50, or an average price of approximately $27 an acre for this property. (ID 13 & n.3) From 1968 until shortly before respondents bought it, 2,000 acres of land in the property that became SWS were sold to the public by Southwest Land Corporation, which apparently was not connected with SWS. (Kritzler Tr. 647) After Southwest Land Corporation declared bankruptcy in 1973, the land was repossessed by its previous owner and sold to SWS. Respondents divided the property into 1,800 parcels ranging from five to forty acres (ID 17) and sold to the public between 1,300 and 1,595 parcels at prices ranging from $2,995 to $3,495 for five acres, which is about $600 to $700 per acre. (Kritzler Tr. 487, 481-82)

The property that became GVA (18 to 25 miles south of Van Horn) was acquired by respondents in 1976 for $750,000, or an average price per acre of $50. (ID 19 n.9) Roughly 15,000 acres were purchased and divided by respondents into 1,200 parcels. Approximately 750 to 930 lots were sold in GVA at $4,000 to $6,000 for a five-acre parcel, which is about $800 to $1,200 per acre. (Kritzler Tr. 488-90) The 9,611 acres that became GVA II, which is adjacent to GVA, were acquired by respondents in 1977 for $602,000, an average price of $63 per acre. GVA II was divided by respondents into 800 parcels. Approximately 550 lots were sold in GVA II for $4,995 to $6,000 for a five-acre parcel, which is about $1,000 to $1,200 per acre. (Kritzler Tr. 49193) Sales were continued in each property to some extent until at least 1979.[5]

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[4] Several photographs of the properties, offered by complaint counsel and by respondents, are included in the record. (*See* CX 436 (photographs included in appraisal report of complaint counsel's expert witness); RXs 26-48 (including photographs of neighboring land))

[5] The record is not entirely clear as to whether respondents are still selling property in GVA and GVA II, although sales in SWS appear to have ended. In their appeal brief, respondents state that "[t]he evidence . . . shows

*(footnote continues)*

## C. MARKETING STRUCTURE

The manner in which the respondents sold land in each of the three tracts is relatively uncomplicated. A total of about 2,600 parcels at the three locations were sold by respondents. (Kritzler Tr. 481, 490, 492) Most sales were made by one of two brokers hired by respondents to sell the parcels, Porter Realty and Diversified Realty.[6] Porter Realty was the single

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*(footnote continued)*

that as of early 1978 respondents virtually ceased all sales," citing Kritzler Tr. 637, 4126, 4127, 4153-54; Elfont Tr. 4168, 4170, 4188. (RAB 59) The pages in the transcript to which respondents draw our attention, however, do not support their proposition unless we interpret "virtually ceased" to mean only that sales through brokers ceased in 1978. Kritzler testified that respondents did not use telephone brokers to sell in the properties after 1978; he did not say that respondents stopped selling land themselves. (Tr. 637) Kritzler also testified that he "terminated" Porter Realty and Diversified Realty in 1978, but again he did not say that respondents stopped selling land themselves, only that they did not hire new brokers. (Tr. 4126-27) His testimony states that respondents stopped making sales in SWS in 1978, but sales in GVA and GVA II were not mentioned. (Tr. 4153-54) Elfont's testimony states that in 1977 only 20 parcels were sold in SWS that he reviewed; sales in GVA and GVA II were not mentioned, though he noted that Porter Realty and Diversified stopped making sales. (Tr. 4168, 4170, 4188)

Although Kritzler testified in April 1981 that no sales "in any acreage" had been made in three years, *id.* at 489-90, that clearly is not the case, since there is ample evidence of sales after April 1978, albeit not at the levels of 1977. In fact, 56 parcels in SWS were sold from November 1, 1978, through October 31, 1979, (CX 13D) 24 parcels in GVA were sold from October 1, 1978, through September 30, 1979, and 52 parcels in GVA II were sold from December 1, 1978, through November 31, 1979. (CX 30D)

Gross stated at trial that the business of SWS "at the present time" was "collecting its contracts from previous sales." (Gross Tr. 297) When asked what "is" the business of GVA, he stated that "it owns property and sells land," and as to GVA II he stated it "sells property." (Gross Tr. 298)

While it is not clear whether GVA and GVA II are still selling property to new customers or selling additional parcels to existing customers, they are, like SWS, still collecting funds under purchase agreements entered into earlier.

[6] Diversified Realty is a Florida corporation that was not named in the complaint. Testimony from at least three consumers who bought land from respondents through Diversified Realty is included in the record. (*See* Goldstein Tr. 1714-77, Limpp Tr. 1385-435, Schlachter Tr. 2107-46)

largest seller of land in the three tracts, and was responsible for up to 80 percent of sales in all three parcels. (ID 47) The respondents' own sales staff was responsible for the second largest number of sales in all three parcels. (Kritzler Tr. 591) Respondents' sales staff for SWS, GVA and GVA II included sales representatives located primarily in offices in Houston and Dallas, as well as a representative on the land, and two sales representatives who contacted, by telephone from the respondents' California offices, people who had already bought land in the respondents' properties in an effort to sell them additional parcels. Similar marketing methods were used by all three corporate respondents.

**1. Sales by Respondents' Staff**

Respondents opened offices in Houston in 1973 and in Dallas in 1975 to sell land in SWS, and in GVA and GVA II after those properties were acquired.[7] Respondents made initial contact with prospects through television, radio, and newspaper advertisements [8] and their sales representatives answered any

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[7] Respondents also attempted for brief periods in 1973 to sell land in SWS through offices in Atlanta and Boston.

[8] Respondents' radio and television commercials ran as often as 100 to 150 times each week during the period when sales were made. (Gross Tr. 409; Novaez Tr. 872) The record contains a number of scripts for commercials used by respondents. (CXs 42-71)

There is some dispute in the record as whether the scripts for respondents' television and radio commercials were admitted in evidence. Respondents argue that the scripts were only "provisionally received in evidence subject to further proof of when, where and if they were broadcast" and contend further that complaint counsel failed to offer such evidence. (RAB 10 n.10) In fact, the ALJ did not receive CXs 42 to 71 on a provisional basis but received them "for what they purport to be" and "subject to further explanation." (Tr. 181) He indicated that he expected further evidence to be introduced about the scripts after which respondent's counsel could move to strike them or excise them from the record.

Prior to trial respondents admitted that the scripts in question, CXs 42 to 71, were genuine (*i.e.* not forged or altered) documents and were obtained from the files of respondents. (Rec. 1016-18) Indeed, it is significant that respondents produced these scripts to complaint counsel in response to investigational subpoenas issued in 1976 and 1978 and under an agreement by which scripts of advertisements used in the sale and promotion of respondents' land could be provided rather than the actual commercial tapes.

*(footnote continues)*

resulting telephone inquiries by providing some information orally and attempting to set up home appointments.[9] The presentations in the home were not very detailed, and were based in large part on the printed materials that respondents either reviewed or left with potential buyers.[10] (Rose Tr. 716,

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*(footnote continued)*

(Tr. 169-71) Respondents also admitted before trial that CXs 42 to 71 "were utilized as scripts for the preparation of radio and television advertisements by SWS, GVA, and GVA II in connection with the promotion, offering for sale or sale of any interest in subdivided land to members of the public." (Rec. 1634)

After the scripts were received in evidence complaint counsel elicited further information bearing on respondents' use of them in marketing. For example, Gross testified extensively about the content and meaning of various statements made in the scripts as he reviewed them (Gross Tr. 413-34) and he confirmed that statements made in some of the scripts were in fact made in some of respondents' commercials. (Gross Tr. 410-11, 416) Several other witnesses also testified that they heard respondents' advertisments and that they recalled statements made therein, some of which correspond closely to statements in the scripts. (Baldridge Tr. 806-07; Lambert Tr. 1782; Robinson Tr. 1906-07; Sowell Tr. 2504-06) Finally, the record reveals that respondents did not, as they had been invited to do, move to strike the scripts. Under these circumstances, we conclude that CXs 42 to 71 are properly in the record as evidence of radio and television commercials used by respondents in their marketing efforts.

[9] If there were scripts used for respondents' telephone presentations they are not in the record. There is no evidence that a prepared script was followed in the in-home presentation, but as one sales representative testified, there were "stock answers" to frequently raised questions. (Novaez Tr. 902)

[10] The sales representative made a presentation in a potential buyer's home with printed materials that respondents either prepared or approved. As a general rule these included color brochures (CXs 86, 87), a "fact sheet" about the property (CXs 81, 82) photographs of actor James Drury, who appeared in several commercials for respondents (CX 242), a "picture book" (CX 170), a report on the fertility of the soil at the properties (CX 220), a purchase agreement (CXs 74, 75), and a topographic map. (Hammer Tr. 657, *see also* Kritzler Tr. 533-36) Though training was relatively brief and informal, sales representatives were instructed not to deviate in their presentations to customers from the information in certain written materials. (ID 29) Respondents testified that they instructed their personnel that termination could result if unauthorized statements about the land were made. (Kritzler Tr. 519; Rose Tr. 722) It is nevertheless clear from the testimony of numerous consumer witnesses that respondents' sales representatives did not limit themselves to the generalities of their written literature but offered specific statements and predictions about the land in some conversations with consumers.

719; Hammer Tr. 660) Respondents also organized dinner parties in an effort to promote purchases by acquaintances, neighbors or relatives of people who had already bought land in the subject properties. (Novaez Tr. 883)

Organized sales in the Houston and Dallas offices were terminated in 1978, apparently due to market saturation. (ID 32) In late 1978, respondents began to sell land from their home office in California to those who had already bought land in the subject properties. (*See generally* ID 33-34) Buyers were sent "updates" (newspaper clippings and other materials of some purported interest to landowners) to encourage them to buy additional parcels, to encourage them to continue making payments on previously purchased land, and to assure them they had made good purchases.[11] (Gross Tr. 371-72; Kritzler Tr. 574)

Respondents did not have an organized on-site sales program, but two on-site representatives were .employed consecutively from 1975 until at least 1981. (*See generally* ID 35-36) Their duties included selling land when the opportunity arose. (ID 35) One of the representatives sold "some" or "very little" land, and the other sold eight parcels. (ID 36) Some parcels were sold on-site to people who were familiar with the land from living in the area. (*See* Sanchez Tr. 3688; Perkins Tr. 4021, 4024, 4035-36)

Sales representatives who were successful in efforts to sell a parcel had the buyer sign a written purchase agreement. Except for the few on-site sales, land typically was bought before the buyers saw the property, which is several hundred miles from Houston and Dallas, although respondents allowed buyers at least 60 days to visit the property and to request a refund if they were dissatisfied. About one-third of the Dallas and Houston buyers actually visited the property. (Novaez Tr. 896)

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[11] The primary vehicles for these materials were property owner newsletters prepared by respondents containing reprints of news articles and montages of news article headlines. (CXs 90-95, 98-102, 106, 107, 109-13)

**2. Sales by Brokers Retained by Respondents**

Respondents contracted with Porter Realty, a Florida corporation, to sell land in SWS on respondents' behalf. (CX 37; Porter Tr. 2249) The contract, termed an "Agents Agreement," gave Porter Realty authority to engage in marketing and promotional activities to solicit sales of the SWS land but did not authorize the firm to execute or enter into land sales contracts on respondents' behalf, providing instead that Porter Realty represented respondents in the sale of property, negotiated sales, and then delivered such sales agreements to SWS for acceptance or rejection. The contract also restricted Porter Realty's authority to use promotional materials and representations other than those authorized by respondents. Sales efforts by Porter Realty began in June 1974 for SWS. (Gross Tr. 381)

Porter Realty also arranged for the sale of parcels in GVA and GVA II after those properties were acquired by respondents. Separate written contracts were not executed between Porter and GVA or GVA II, but the parties agreed orally that the terms of the SWS contract governed Porter's rights and responsibilities with respect to marketing those properties. (Porter Tr. 2250) Porter Realty arranged approximately $11.9 million in sales of land at SWS, GVA, and GVA II before discontinuing its relationship with respondents in early 1978, and the firm received about $2 million in commissions from respondents. (Porter Tr. 2264) The firm arranged the sale of approximately 2,150 of the 2,600 parcels sold. (ID 47)

Porter Realty sold the properties for respondents solely by telephone solicitation. Sales personnel called individuals throughout the United States who had previously purchased land from either Porter Realty or from another land sales company. (Porter Tr. 2325) Scripts were used to provide information to consumers over the telephone,[12] and those

[12] The scripts Porter Realty's sales representatives used for their first and second telephone contacts with consumers are included in the record. (CX 123, 124 (SWS); CX 124, 125 (GVA)) The firm prepared these scripts based on information supplied by respondents and the scripts were approved orally by respondents Gross and Kritzler. (Porter Tr. 2294-95) Testimony of consumer witnesses establishes that Porter Realty's sales representatives did not confine their oral statements about the land to the points made in the telephone scripts.

prospects who expressed interest in the land were mailed a packet of information.[13] Porter Realty also gave numerous consumers copies of an oil map (CX 129), a three-page photocopied document purporting to indicate the ownership of various parcels of land in the area surrounding GVA and GVA II.[14] The map may have been used during the entire time that Porter Realty sold GVA and GVA II property, from 1976 to early 1978.[15] When a sale was agreed to, Porter Realty mailed a letter to the potential buyer encouraging him or her to sign the enclosed Sales Agreement and to return it with a downpayment to the particular corporate respondent involved. Porter Realty selected the parcels to be sold to consumers and apparently assigned them at random.[16]

The circumstances surrounding the dissolution of Porter Realty's relation with respondents in April 1978 are a matter of

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[13] The information Porter Realty provided included brochures, fact sheets, and copies of the contract for sale. These materials were imprinted with the names of the corporate respondents, and were supplied to Porter Realty by respondents. (Porter Tr. 2270-71) Porter Realty also placed other materials in this packet from time to time. (Porter Tr. 2274-75, 2314-15)

[14] In the form that the document was mailed to potential purchasers, the first page (CX 129C) indicated the location of GVA and the immediately surrounding area in the west part of Culberson County. The second page of the map (CX 129B) showed land holdings in and near Van Horn, also in the west part of the county, and listed Texaco, Inc., as owning land or mineral rights in several parcels in that section of the county. The third page of the document (CX 129A) indicated producing and inactive oil and natural gas wells in the east part of the county. The names "Texaco", "Gulf", "Skelly", "Exxon," and several other oil and gas concerns are prominent, indicating that they held mineral leases in this area of the county. Porter Realty did not obtain the oil map from respondents but acquired it directly from a map company in Texas. (Porter Tr. 2313)

[15] One consumer testified that he received the map before buying a parcel in GVA in June 1976. (Grygleski Tr. 1457; *see* CX 284 (purchase agreement)) Porter stated the map was first used in late 1976 or early 1977. (Porter Tr. 2357) John Swanson received a copy of the oil map before he purchased a GVA parcel in February 1977. (Swanson Tr. 2470) Limpp received a copy of the oil map (introduced as CX 495) before purchasing land in GVA in April 1977 from Diversified Realty. Several land holdings of Texaco and the University of Texas were circled on this copy of the map. (Limpp Tr. 1393-95)

[16] The record does not indicate whether consumers who purchased other than on-site were able or attempted to choose particular lots.

some dispute, as the Initial Decision recounts. (ID 48-50) Porter Realty stopped selling land directly for respondents in early 1978, although it did apparently arrange resales of consumers' property to other consumers later.

Diversified Realty, another Florida broker, was retained in 1976 by respondents to sell land in GVA and GVA II, and this firm sold the third-largest amount of land. Diversified also sold the land through telephone solicitation and, like Porter Realty, gave copies of the oil map to prospects. (Goldstein Tr. 1767; Schlacter Tr. 2121) This firm's association with respondents also ended in early 1978. A relatively small number of sales were made by a broker named Holgin, who was retained in 1978 to market GVA land to prospects in the South Pacific. (ID 56)

### 3. Respondents' Surveillance of Brokers

Because of respondents' asserted concerns about oil-related representations by sales representatives of its brokers, respondents hired an employee, Jeffrey Elfont, to recontact customers who had already purchased through the brokers. He worked for respondents from 1977 until the brokers were terminated in early 1978. The Initial Decision describes how Elfont telephoned customers, questioned them about whether oil representations had been made, and then informed them of the absence of oil development in the area. (ID 124) For the first six months of his employment Elfont basically verified with customers the information on their contracts and reviewed with them the written promotional materials. During the later months he also inquired whether oil or resale representations had been made. (Elfont Tr. 4192-95). Though Elfont claimed to have contacted virtually all purchasers, several testified that he did not contact them. (Leuckel Tr. 1860; Sweets Tr. 1955; E. Smith Tr. 2096; Stein Tr. 2211, 2226)

When Kritzler learned that oil representations had been made to a customer he also recontacted the customer and told him or her not to expect any benefits from oil development on the land. Where customers had purchased land for its oil production capability Kritzler claims the contract was cancelled and money refunded. (ID 125-126) A few consumers testified

that they did receive refunds, one after threatening a lawsuit. (Leuckel Tr. 1842; E. Smith Tr. 2095; Limpp Tr. 1420) Other purchasers asked respondents to repurchase their lots or provide refunds and were refused, or were never offered a refund. (Bear Tr. 1127; Switaj Tr. 1315; Danskin Tr. 2454) Though Kritzler was aware for. some time of complaints about oil representations involving Porter Realty personnel, he could not remember any instances in which sales made by Porter Realty were rejected. (Kritzler Tr. 598-99)

**4. Terms of Sale**

The purchase agreements used by the three corporate respondents (and by their brokers on their behalf) are substantially identical. (*See* CXs 74-78) To execute the purchase agreement the buyer made a small cash downpayment, usually five to ten percent of the purchase price. The balance was to be paid monthly over ten years, with a seven percent finance charge.

Respondents agreed in the contracts to construct a nine-hole golf course on SWS, and to build and maintain "crowned" dirt access roads on SWS.[17] On GVA and GVA II, respondents agreed to build dirt access roads, but stated that buyers were responsible for their maintenance. No other improvements or services were promised. The agreements expressly provided that respondents maintained no program for repurchase or resale of lots on behalf of purchasers, and instead referred purchasers to independent real estate agents for this purpose.

Consumers were given 60 days under the contract terms in which to make a "personal inspection" of the property and to obtain a refund within that time if they inspected the property and were dissatisfied. The precise number of buyers who actually visited the land, which under the contract terms is a precondition to obtaining a refund, is not entirely clear. Employees of respondents who lived on the subject properties testified that a total of fewer than 500 buyers ever visited the properties. (W. Smith Tr. 939 (400 buyers visited before

[17] Respondents did not promise to construct roads on the eastern portion of SWS known as Sunsites Ranch—Unit II. (ID 278)

November 1978); Gilmore Tr. 991 (75 buyers visited after November 1978)) One of respondents' sales representatives stated that about one-third of the purchasers who bought directly from respondents in Houston or Dallas visited the property. (Novaez Tr. 896).

## II. COMPLAINT ALLEGATIONS

We next consider the allegations of the complaint by examining in the first and second counts of the complaint, whether such representations correspond to the record evidence about the land's value and suitability for particular uses, and whether material information was omitted in respondents' promotion of the land. We also review the evidence bearing on the third count, which alleges that respondents acted unfairly by inducing consumers to make continued payments and advance payments on land of little or no value for the uses represented, and by retaining the monies paid.[18]

Our examination of what respondents said and did not say about the land they marketed, as alleged in the complaint, proceeds from the perspective of the net impression communicated to the public. *See American Home Products Corp.*, 98 F.T.C. 136, 374 (1981), *aff'd as modified*, 695 F.2d 681 (3d Cir. 1982); *Horizon Corp.*, 97 F.T.C. 464, 804 (1981). In other words, it is the overall impact of respondents' practices on consumers that we must assess. This approach is particularly appropriate in this case because most consumers received a number of materials from respondents and discussed the proposed transaction with respondents or their brokers on more than one occasion. (Morley Tr. 1343; Stein Tr. 2204-08; Swanson Tr. 2467-69). In addition, while some of the statements respondents made to prospective purchasers orally and in their promotional materials are express misrepresentations about the land's investment value and potential use, as we discuss *infra*, in other instances the full import of respondents'

[18] The legal standards under which we consider the allegations of deception and unfairness appear in Section III, *infra*, along with our analysis of how the evidence discussed in this section meets those standards.

message appears only when the statements made are considered in the context of other statements.[19] Because consumers' impressions were formed not by any single act or practice but by an accumulation of carefully intertwined threads, we measure the allegations of the complaint against the entire fabric of respondents' marketing practices.[20]

## A. INVESTMENT REPRESENTATIONS

In Count I of the complaint (paragraphs nine through eleven) the Commission alleged respondents represented the lots they sold as good investments at the prices at which they were offered for sale and also represented that purchase of these lots involved little or no financial risk. The complaint further charged that respondents' lots were not good investments offering little or no financial risk at the prices at which they were sold. Finally, the complaint asserted respondents failed to disclose to prospective purchasers material facts about the riskiness of the investment, the uncertainty of the future value of the lots, and the probability that purchasers would be unable to resell their lots at or above the purchase price.

The ALJ found that with few exceptions respondents' advertisements and sales literature did not represent the land as a good or low risk investment. (ID 60, 64, 76) He also failed to identify a pattern of such representations in sales presentations by respondents' representatives. (ID 82) The ALJ agreed that

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[19] Thus written materials provided by respondents were in some instances viewed as confirming points made in oral discussions consumers had with respondents or their representatives (Limpp Tr. 1398, Goldstein Tr. 1726), and express claims may have influenced the interpretations consumers gave to implied claims. Similarly, claims that standing alone might have appeared entirely permissible, when made in the context of pervasive express and implied misrepresentations contributed to the communication of an overall misleading impression about respondents' land.

[20] That the ideas respondents implanted in consumers' minds were to some extent communicated indirectly and through an accretion of separately stated facts does not alter their message. Indeed, by repeating the investment message in varying forms and media, respondents' approach may have been both more persuasive and less apt than a single, exaggerated, express representation to raise consumers' defenses.

investment representations were made by respondents' brokers but ruled respondents' efforts to prevent or correct them relieved respondents from liability for them. (ID pp. 113-14) Having reviewed the record evidence on these points, we conclude that the ALJ did not properly consider the net impression communicated to consumers through respondents' written and. oral statements. Accordingly, the ALJ's findings in these respects are set aside.

The record evidence firmly establishes that respondents and their brokers represented the land at SWS, GVA and GVA II, at the prices at which it was sold, as a good, profitable, safe, and easily resold investment with little or no risk of loss. These representations, made to prospective purchasers in advertisements, written and graphic promotional materials, and in oral sales presentations, took three forms: (1) general assurances that land, and therefore this land in particular, is a good investment and a good way to make money; (2) specific assurances that profits on this land could be realized in a short time frame, that purchasers could expect to double or triple their money, and that no loss would be suffered; and (3) descriptions of oil and gas activity and other potential developments in the area, as well as recitals of residential, farming and ranching uses for the land, that conveyed the representation that the land was a good investment.

**1. General Investment Representations**

Respondents' media advertisements, which in many instances provided the first contact with prospective purchasers, raised the investment theme generally through references to land as a means of gaining financial independence and protecting purchasers from inflation.[21] The same point appears more directly in respondents' written materials. Respondents' SWS brochures acclaimed the land as offering "rich" potential "for

[21] One advertisement stated "[h]ere's how you can buy independence and protect yourself against inflation at the same time! Land is always your best buy..." (CX 43) Other statements contributing to the general investment theme include those referring to the land as "investment property" (CX 58), suggesting that the land be purchased and held "for the future" (CX 67), and warning that the quantity of land was declining so that this purchase was "the opportunity of a lifetime." (CXs 46, 71)

the investor" and informed consumers that the property had undergone a "thorough analysis . . . for future potential" which assured buyers of "good value."[22] (CX 86E, N, 87D, L) Though these promotional brochures were toned down in each successive revision,[23] each brochure contained a variety of references to land as a valuable and safe investment and the general investment theme never totally disappeared, even from the latest, tamest versions.

All versions of respondents' brochures highlighted the views of famous Americans on the wisdom of investment in land as the best, the safest, the most certain and the quickest way to make a fortune.[24] (CXs 86 to 89) These quotations

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[22] Respondents used four different color brochures. (CXs 86-89) The first (CX 86)—a SWS brochure—was prepared and used by Southwest Land Corp., a former marketer of the land. When respondents bought the land in 1973 they continued to use the same brochure for some 60 to 90 days while a new one was in preparation. The second brochure (CX 87)—also a SWS brochure—was a revision of the first one that eliminated a few explicit investment and land appreciation claims. The third and fourth brochures (CXs 88, 89) were revised for use with sales of GVA and GVA II property, and a few additional investment-oriented references were deleted. The brochures used early in marketing efforts at SWS were the most explicit, calling the land at SWS the "new prime investment spot in the Southwest," describing "leaping" land values, and projecting even greater "future growth potential." (CX 86I) Similarly, references to residential and commercial uses of the land in the SWS brochures accompanied the observation that this land offered purchasers many possibilities "as an investor." (CXs 86I, 87J)

[23] According to Kritzler, the second SWS brochure was "toned down" from the earlier one because "we were not selling appreciation of the land. We were selling use." (Kritzler Tr. 4103) However, only some references to investment were deleted while others were retained. Kritzler also testified that the subsequent brochures prepared for GVA and GVA II were not as direct as the first SWS brochure because respondents believed that various state and federal regulatory agencies discouraged investment representations. (Kritzler Tr. 4105) Again, some investment representations were eliminated and others retained.

[24] The brochures contained the following quotations:

> Theodore Roosevelt: "Every person who invests in well-selected real estate in a growing section of a prosperous community adopts the surest and safest method of becoming independent, for real estate is the basis of wealth."

*(footnote continues)*

expressly communicate that land is a good, safe investment. They are positioned in respondents' promotional brochures in the midst of extensive pictorial and verbal presentations of respondents' land, and they appear to have no other purpose than to supplement the information being provided to consumers about respondents' land. Phrasing these observations as universal truths about land ownership and communicating them through the words of famous forebears does not alter the fact that the representations in form and substance apply to respondents' land and undoubtedly were intended to do so. As we observed in *AMREP Corp.*, 102 F.T.C. 1362, 1643 (1983), *petition for review filed,* No. 84-1434 10th Cir., April 2, 1984), when representations are stated as principles of general applicability consumers may be led to believe (in the absence of any disclosure to the contrary) that those representations also apply "to the particular real estate investment opportunity being offered." In the context of respondents' orchestrated marketing materials, the commercial use of famous sayings provides not simply a general commentary on land but a specific association with respondents' land. We therefore conclude that these

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*(footnote continued)*

> Grover Cleveland: "No investment on earth is so safe, so sure, so certain to enrich its owners as undeveloped realty. I always advise my friends to place their savings in realty near some growing city. There is no such savings bank anywhere."
>
> Andrew Carnegie: "Ninety percent of all millionaires become so through owning real estate. More money has been made in real estate than in all industrial investments combined. The wise young man or wage earner of today invests his money in real estate."
>
> Marshall Field: "Buying real estate is not only the best way, the quickest way, and the safest way, but the only way to become wealthy."
>
> George Washington: "A moment's reflection must convince you of two things: first, that land are of permanent value; that there is scarcely a possibility of their falling in price, but almost a moral certainty of their rising exceedingly in value."

(CXs 86 to 88) The GVA II brochure (CX 89) contained all but the quotation from Washington.

quotations contributed to the general investment marketing theme respondents conveyed to consumers.[25]

The sales presentations used by respondents and their brokers elaborated on the investment value theme, as numerous witnesses testified. Indeed, sales representatives for respondents and for their brokers were authorized to repeat this theme in oral sales pitches because respondents supplied sales representatives with brochures raising the investment idea for use in their marketing efforts. (Hammer Tr. 652, 657; Kritzler Tr. 4107; Porter Tr. 2271-72) We conclude that these oral and written statements about the value of land as an investment represented to consumers that respondents' land, too, was a good investment and was being sold for investment purposes (*i.e.*, as a safe way to make money).

**2. Profit, Resale and Safety Representations**

After establishing with consumers the representation that their land, like all land, was generally a good, safe investment,

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[25] Other written materials respondents used had a similar approach and effect. For example, newspaper and magazine articles on farming and commercial developments in the area which were provided to actual and prospective purchasers consistently stressed the point that land is valuable, its price is soaring as its availability declines, and it is the best money-making investment. (CXs 91, 106, 109, 111, 131) Though most of these articles did not describe SWS, GVA, and GVA II property, their use by respondents makes a connection to respondents' land unavoidable. The same is true of respondents' picture book used by sales staff in Houston and Dallas (CX 170), which emphasized the growth potential and value of land and set forth "A Reluctant Investor's Lament," a poem describing numerous good land investments (including Peter Minuit's purchase of Manhattan for a few "trinkets") missed by the narrator who hesitated to buy at the right time or price. These materials do not of themselves refer to respondents' land but they appear interspersed with photos of land in the Van Horn area and articles about respondents' property and developments in West Texas, thus providing a specific link to respondents' land. *See AMREP Corp., supra.*

We find all of these general commentaries contributed to the investment theme respondents' presented to consumers. Whether such representations, standing alone, represent that respondents' property is a good, low-risk investment we need not and do not find. We conclude instead that they supplemented and therefore contributed to the investment value representations made throughout respondents' sales materials and sales presentations.

respondents elaborated on the point by describing in more concrete terms how valuable the investment was. The SWS brochures stressed that the value of property in the region was "leaping every year" and had "unlimited" growth potential. (CXs 86I, 87J) Respondents' first SWS brochure, used for two to three months, added the express claim that land in the area had "increased in value by over 20%" in the previous year. (CX 86I)

Similar assertions were made in oral sales presentations to prospects. Many consumers were told that their land would appreciate and could be resold for a profit in a short time frame, from three to four months to a few years.[26] Others were told they would double or triple their investment or make "lots of money."[27] Sales representatives offered assurances on numerous occasions that the land could be resold quickly and for a substantial profit. They also emphasized the safe and risk-free nature of the purchase, suggesting that there would be no loss on the resale nor any delay in receipt of its proceeds.[28] The

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[26] Many witnesses testified that they or family members were told expressly by sales personnel for respondents or their brokers that they could make substantial profits for various reasons by buying the land and holding it for only a few years. (Switaj Tr. 1276, 1279-80, 1287; Morley Tr. 1340-42; Limpp Tr. 1399-1400, 1402; Grygleski Tr. 1446, 1453, 1456, 1474; Buck Tr. 1503; Allienello Tr. 1624, 1626-27; Goldstein Tr. 1719-22; Lambert Tr. 1284-88, 1297; Leuckel Tr. 1823-25, 1827, 1829, 1831-32, 1834, 1868-69; Robinson Tr. 1914; Sweets Tr. 1948-53; Smith Tr. 2064-65, 2070) The time period in which appreciation was promised ranged from three or four months (Leuckel Tr. 1824, 1862) to two or three years. (Switaj Tr. 1341) Several consumers were promised profits in one or two years. (Sweets Tr. 1948; Smith Tr. 2064; Danskin Tr. 2422)

[27] Several consumers were told that the land would double or triple in value and then could be resold. (Bear Tr. 1117; Buck Tr. 1503; Stein Tr. 2204; Munch Tr. 2524) Many were told that the land was appreciating, had great "resale potential" or could be turned over quickly. (Switaj Tr. 1287, Lambert Tr. 1784; Rawlins Tr. 2150; Swanson Tr. 2463, 2469) One consumer expressed reservations to the Porter Realty sales repreentative, commenting "you will make me a rich man or a poor man." The sales representative replied, "I will make you lots of money." (Switaj Tr. 1280)

[28] Some purchasers were assured they would suffer no loss on their purchases since they would always be able to get back the money they put in. (Robinson Tr. 1915; Munch Tr. 2451) Indeed, Mr. Porter expressed surprise

*(footnote continues)*

testimony of consumer witnesses in the record further confirms that they understood respondents' statements to be investment representations; numerous purchasers gave as reasons for their purchases that they bought the land for resale, to make a profit, and to hold as a short-term investment. (Baldridge Tr. 821; Switaj Tr. 1288; Morley Tr. 1347; Limpp Tr. 1400; Grygleski Tr. 1453; Allienello Tr. 1641; Davis Tr. 1680-81; Lambert Tr. 1787, Leuckel Tr. 1829; Robinson Tr. 1915; Smith Tr. 2062; Schlacter Tr. 2114; Sowell Tr. 2516; Munch Tr. 2557)

As evidence either that the representations were not made or were not misleading, the ALJ relied on the fact that consumers discounted these representations by testifying that they knew there was no guarantee they would profit. (ID p. 113) In our view, this misapprehends both the allegation of the complaint and the substance of this testimony (most of which was elicited on cross-examination). Count I alleges not that profits were guaranteed but that the land was marketed as a good investment with little or no risk. Consumers' understanding that the land was not "guaranteed" or that investments generally were not risk-free simply does not resolve the issue of whether respondents marketed the land as having little or no risk. An admission that consumers recognized these investments as having some risk is not inconsistent with the complaint allegation that respondents represented their land as having *little* risk. Moreover, consumers could have general knowledge of the riskiness of investments and still believe that *this* investment differed from the run-of-the-mill. Indeed, respondents' marketing program seems designed to distinguish these investments from those the witnesses believed had some risk by suggesting the land was a safe and sure way to profit. We believe the ALJ erred to the extent he suggested that consumers' unfocused, common sense beliefs about risks in

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*(footnote continued)*

to one consumer that respondents had not yet tried to buy back his parcel because it was such a good deal. (Sweets Tr. 1959) Respondent Gross confirmed the message behind the representation that respondents' land "can be a hedge against inflation" (CX 43) when he testified that his basis for the statement was that it "certainly isn't going to go down in value." (Gross Tr. 414)

investing eliminated the propensity of respondents' representations to lead consumers to believe this land was a good investment.

### 3. Representations About Development and Use of the Land

Perhaps the most common and pervasive investment representations respondents conveyed about their land were representations that it was a good investment because it could be developed and used for assorted purposes. The specific possibilities raised included oil and gas production, other commercial and industrial development, and residential, farming and ranching applications.

The most controversial development representation relates to the potential for oil and gas production on respondents' land. The record demonstrates that these representations were made primarily in connection with sales of land at GVA and GVA II. Respondents' written materials contributed to oil and gas representations by referring to oil as one of several major industries in the area (CXs 83-85 (GVA and GVA II fact sheets)) and by pointing out that "oil production is underway" in the county.[29] (CXs 88F, 89D (GVA and GVA II brochures)) More explicit representations came from the "oil map" used by respondents' brokers, which demonstrated the presence of oil in the area graphically by indicating the location of oil and gas wells in one part of Culberson County and by listing the names of oil companies with land holdings near GVA and GVA II. (CX 129) As one salesman noted, with the oil map there was little additional need to tell buyers about oil in the area because they could see on the map that Texaco owned land or mineral rights and buyers would ask about it even when oil was not mentioned to them. (W.D. Smith Tr. 973)

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[29] We cannot agree with respondents' assessment of these references as "innocuous." Not only was oil cited as a major industry in the area and thus as a rationale for the land's purchase, but references in respondents' written materials to the oil industry and oil production elsewhere in the county served as a basis for oral representations to the same effect which respondents authorized its brokers and sales representatives to make.

Whether or not the oil map made it unnecessary to mention oil, many sales representatives did mention it. Sales representatives for the brokers referred repeatedly to oil development in telephone conversations with consumers, informing them that exploration was underway in the area and that oil companies were moving into the area and might be interested in buying their land.[30] Some representatives went on to describe how increasing oil exploration in the area would lead to construction of an oil refinery and in turn to a demand for land for worker housing, so that consumers were assured of making money whether or not oil and gas was discovered on their property. (Allienello Tr. 1624, 1651; Morley Tr.1350; Danskin Tr. 2429)

The record does not reveal a pattern of express representations that oil actually existed or was sure to be discovered under the land respondents were marketing.[31] Rather, the record shows a concerted effort by respondents as well as by their brokers to highlight for consumers the oil industry in the area and to emphasize the fact that oil exploration was occurring nearby while creating the impression (particularly through the "oil map") that there were substantial oil reserves quite near the property. As we discuss *infra,* under the legal analysis

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[30] A number of consumers were told that oil companies had done "a lot of exploration" or were moving into the area. (Sweets Tr. 1959; Grygleski Tr. 1456-57; Swanson Tr. 2468) Other consumers were assured that there was "great potential" for oil discovery or that oil was "nearby" or "in the vicinity." (Goldstein Tr. 1720-21; Munch Tr. 2524, 2567; E. Smith Tr. 2073-74; Grygleski Tr. 1455; Limpp Tr. 1422; Rawlins Tr. 2149) Some sales representatives explained that the possibility of oil made respondents' land an attractive investment because "oil companies wanted to lease or buy the land to eventually look for oil on it" (Stein Tr. 2202) and because landowners could sell oil and gas found on the property directly to the company that made the discovery or make a royalty arrangement. (Goldstein Tr. 1721)

That Porter Realty's sales representatives discussed oil development in the area with prospective purchasers is confirmed by the fact that the company's script for first telephone calls refers to oil as a major industry in the region. (CXs 122, 123) According to respondent Kritzler, oil-related representations by Porter Realty may have affected 60 percent of the firm's sales. (Kritzler Tr. 598)

[31] One consumer was told oil was there or would be found as soon as drilling commenced. (Limpp Tr. 1389)

described in Section III, these practices represented to consumers that respondents' land had substantial value as an investment because of the presence of oil and oil-related development.[32]

Respondents also promoted their land as an investment by describing various potential commercial and industrial developments in the area. Several consumers were told there might be a nuclear power plant or uranium enrichment plant constructed in the area and that the property therefore would increase in value. (*See* Goldstein Tr. 1726; Lambert Tr. 1789; Sweets Tr. 1950, 1959; Danskin Tr. 2429-30; Munch Tr. 2526, 2565) Respondents included news articles about a possible new power plant in their promotional picture book and in mailings to purchasers. (CXs 93, 170P) Respondents' references to possible construction of a rubber plant for processing guayule (which purportedly could be grown on the land) conveyed a similar message. (Leuckel Tr. 1823-24; Gross Tr. 568-73; *see* CXs 119, 120)

Respondents also emphasized the current and future value of their land by pointing to its potential use as residential, farming and ranching property. Indeed, respondents admit representations were made about use of the land for these three purposes (RAB 36, 39, 45-46), though there is some dispute about how broadly those representations were made. However, we find that respondents' representations about the practical uses of the land contributed to the impression that purchase of the land was a good investment because these uses could attract other purchasers who might buy the land for those purposes.

**4. Respondents Oral Representations**

The ALJ concluded that some oral investment representations were made by respondents' brokers but that a pattern of

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[32] Testimony from a number of consumer witnesses confirms they believed the land they purchased had value because of the likelihood of oil exploration and related development activities. (Limpp Tr. 1395; Grygleski Tr. 1492; Sweets Tr. 1959; Rawlins Tr. 2181; Stein Tr. 2221, Swanson Tr. 2471-72) Indeed, Richard Morley maintained that he would not have purchased the land had he not been assured that Texaco would buy it from him for a refinery. (Morley Tr. 1384)

such claims could not be attributed to respondents' own sales force. (ID 82) We find sufficient evidence that such representations were in fact made by respondents' own sales representatives. As we have noted above, many of respondents' promotional materials contained express and implied investment representations, including allusions to the fast appreciation of the land and its proximity to oil exploration. Respondents' sales representatives were authorized to rely on these materials in their sales pitches. Moreover, several consumer witnesses testified about investment claims made not by the brokers but by respondents or their sales personnel. (Leuckel Tr. 1824, 1843, 1862; Buck Tr. 1503, Robinson Tr. 1919, Danskin Tr. 2432; Davis Tr. 1694-98) Although the bulk of the oral representations in the record (particularly those pertaining to oil activities) were made by Porter Realty and Diversified Realty, we believe that respondents' written and oral practices included a pattern of investment-related representations.

## B. ACCURACY AND COMPLETENESS OF REPONDENTS' INVESTMENT REPRESENTATIONS

Having determined that investment representations were made to consumers, we next must determine whether respondents may have misled consumers either because their representations were inaccurate or because they failed to reveal material facts needed to correct misimpressions their actions created. The essential question is, was the land at the prices at which it was sold a profitable, safe, and easily resold investment with little or no risk of loss? The record demonstrates that it was not, and that respondents' practices were misleading both because the representations were inaccurate and because they failed to disclose to consumers the uncertainty of the land's future value and the absence of a resale market.

### 1. Accuracy of Investment Representations

Our focus in evaluating respondents' investment claims must be on the available evidence of the land's value, appreciation, profitability, resale potential, and safety during the time in which it was sold, and how closely evidence as to these points corresponded to respondents' affirmative representations of the

land's investment value and freedom from risk. Testimony about the land's market value during the relevant time period provides some evidence of its value and its potential for appreciation and profit. Witnesses for both parties testified as to the land's market value. (ID 379-429) Estimates varied from below $100 an acre to over $500 an acre depending on the time period and parcel size. (ID 400, 429) The following chart summarizes some of the relevant testimony as to the land's estimated market value and selling price per acre provided by complaint counsel's primary witness E. T. Compere, Jr., respondents' primary witness Larry Brooks, and respondent Kritzler.

| | SWS (1/74) | GVA (1/76) | GVA II (1/77) | SWS (7/80) | GVA (7/80) | GVA II (7/80) |
|---|---|---|---|---|---|---|
| Estimated market value per acre of land sold in large tracts | $35 | $50 | $60 | $60 | $65 | $80 |
| Estimated market value per acre of land sold in parcels of five to 40 acres (Compere Tr. 3226-30, 3275) | $54-62 | $55-62 | $90-110 | $90-110 | $70-95 | $70-110 |
| Estimated market value per acre of land sold in tracts of: | | | | | | |
| five acres | | | | $525 | $525 | $525 |
| ten acres | | | | $475 | $475 | $475 |
| 20 acres | | | | $375 | $375 | $375 |
| 40 acres | | | | $275 | $275 | $275 |
| (Brooks Tr. 4411) | | | | | | |
| Selling prices per acre for land sold in five acre tracts (Kritzler Tr. 487-93) | $600 | $800-1200 | $1,000 | $700 | $800-1200 | $1100-1200 |

Respondents' sales prices—ranging from $600 per acre in SWS in 1974 to $1200 per acre in GVA II in 1980—thus far exceeded the market value estimated by expert witnesses for both parties. In complaint counsel's view, these prices were approximately ten times the market value of the land, while in the view of respondents' experts these prices were at least 50 percent more than and perhaps double the market value of the land.

These figures allow us to consider whether in fact purchasers of the land could have realized profits during the period for which data are available, assuming the land could be resold for its market value. According to respondents' expert, a consumer who purchased five acres at SWS for $600 an acre in 1974 owned property worth only $525 an acre six years later in 1980. Similarly, a consumer who bought a five acre parcel at

GVA II for $1,000 an acre in 1977 owned property worth only $525 an acre three years later in 1980. Even assuming sales at above market value (Compere Tr. 3454) and appreciation of the property [33] consumers were unlikely to break even on their resales, if the land could in fact be resold.

These discrepancies between the land's estimated value and the prices consumers paid may explain in large measure the next significant fact established in the record: that there was virtually no resale market for the land. Reselling the land without the assistance of respondents or their brokers was at best a rare event. Some resales were handled by Porter Realty, but these were exceptions to the general refusal of respondents to resell buyers' properties.[34] In any event resales by Porter Realty do not provide much insight into the value or liquidity of the land since such resales were accompanied by the same sorts of representations that accomplished the original sales. (Stein Tr. 2198-2228; Rawlins Tr. 2146-97)

More probative on these issues is the testimony of Martha Conoly, the only full-time real estate broker in the Van Horn area.[35] She stated that she was contacted by purchasers of the property who sought to list their land for resale, but she refused to take any such listings because of the lack of demand. More specifically, Mrs. Conoly maintained that there was little demand for land in the Van Horn area unless utilities were

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[33] Brooks testified that land in the area was appreciating at the rate of one-half of one percent per month, or six percent a year. (ID 425) This testimony contrasts with respondents' claims that land in the region had appreciated 20 percent one year and was "leaping" every year. (CXs 86I, 87J)

[34] At least two consumers sold their land to third persons through Porter Realty, and perhaps more were successful. (ID 99, 101; RAB 52-53)

[35] Mrs. Conoly also testified as to her assessment of the market value of the land in its undeveloped state, pegging it at $50 to 70 per acre. The ALJ gave little weight to this testimony. Respondents attack her testimony with the curious argument that she was not qualified to estimate the land's value though she was qualified to say at what price she could sell it. They also criticize the knowledge and basis she had for her valuations. (RAB 51) We believe Mrs. Conoly's experience and credentials are such that her estimates of the land's value deserve more than minimal weight, and we consider her testimony probative on the issue of the land's market value.

available and present on the property. Respondents' land was sold as undeveloped property without water or utilities installed. She also testified that no other realtors in the county had accepted listings on the property. (Conoly Tr. 1063-68)

Numerous buyers testified likewise that they tried but were unable to list the land for sale with a realtor. (Bear Tr. 1128; Switaj Tr. 1313; Goldstein Tr. 1743; Sowell Tr. 2519) Indeed, respondents conceded that at least half of complaint counsel's witnesses were unable to resell their lots.[36] Mr. Lambert's efforts to resell his property are enlightening. He purchased 10 acres of GVA land for $4,995 and later listed the property for sale with an independent realty company in Houston after respondents' salesman refused to try to resell it. (Lambert Tr. 1794-95; CXs 369, 446-447) He listed the property with an asking price of $8,000, after one of respondents' sales representatives told him his land was worth that amount. After two years on the market and a reduction in his asking price to either $4,000 or $5,000, Lambert had not sold the land and had received no serious contacts. (Lambert Tr. 1793-96)

Respondents' efforts to distinguish between the value of their land and its liquidity are in our view unavailing. (RAB 22, 53 n.42) First, the record establishes that respondents represented one aspect of the land's investment value to be its ease of resale. To the extent respondents concede the property is not liquid and cannot easily or quickly be resold (as the record confirms), these representations are admitted to be false. Moreover, the definition of fair market value set forth by witnesses for both parties includes consideration of whether sale of the property can be completed within a reasonable time

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[36] Respondents assert there is evidence that 76 parcels were successfully resold while only eleven consumers were unsuccessful. (RAB 52) As support, respondents cite six sales (including three by a single owner and two by Porter Realty) and an "admission" of complaint counsel that 70 other resales were made by 62 owners. (RAB 52-53) Whether or not the Commission may properly consider this admission (now disputed by complaint counsel) probative evidence, we decline to give it much weight since there is no other evidence of this level of resales in the record, no explanation that we can discern for the absence of such confirming evidence, and the credibility of complaint counsel's supposed admission seems at best questionable.

frame. (Compere Tr. 3182; Brooks Tr. 4324-25) It follows that the length of time required to sell a property—its liquidity, in other words—has a decided bearing on its value.

Our review of the record evidence leads us to conclude that respondents' investment representations that the land was a good investment, could be resold easily and quickly, for a profit, and with little or no risk were not accurate. Regardless of which assessment of market value we accept, the selling prices substantially exceeded fair market value so that profits—and certainly profits of the level respondents and their brokers declared possible—were unlikely to be attained.[37] Nor does it appear that the property appreciated rapidly so that short-term profits could be taken; the testimony of respondents' own expert is to the contrary. (ID 425) Extensive evidence as to the absence of a resale market also contradicts respondents' assertions that the land could be turned over quickly and was a safe investment since consumers who wanted to get back their monetary investment had difficulty doing so even when the land was on the market for extended periods or at reduced prices. The absence of any resale market demonstrates in this instance the low value or the land relative to its selling price, the resulting inability of owners to realize profits because sales cannot be accomplished, and the difficulty owners have getting their monetary investment back without a substantial loss, all contrary to respondents' marketing messages. In the context of this evidence, we find that respondents' investment representations were inaccurate and therefore misleading. *See AMREP Corp.*, 102 F.T.C. 1362, 1637-42 (1983), *petition for review*

[37] We do not suggest here that land must be sold at or near its fair market value to pass muster under Section 5 of the FTC Act, and we need not and do not reach any conclusions about what the "correct" selling price of the land should be. (Indeed we would be extremely hesitant to second-guess the market in making such a determination.) We also do not suggest that the sale of property at prices two to ten times its market value is, in and of itself, misleading or deceptive. It is instead the sale of property at such prices in combination with representations that it is a good, profitable, low-risk investment that establishes liability in this case because of the effect elevated prices have on the potential appreciation and profitability of consumers' investments.

*filed,* No. 84-1434 10th Cir., April 2, 1984); *Horizon Corp.*, 97 F.T.C. 464, 817-20 (1981).

**2. Accuracy of Development Representations**

Respondents' principal development representations involved references to oil and gas activity and to other commercial developments including a potential nuclear plant. With respect to the claims about oil and gas, the ALJ determined that "much of what was represented to prospective purchasers concerning oil turned out to be at least reasonably accurate." (ID p. 113) However, he did not discuss this conclusion at length because he found that Porter Realty was responsible for most of the representations and that respondents were not liable for their brokers' conduct.

The record establishes that at least some of respondents' oil and gas representations were literally true. Oil drilling clearly is an industry in Culberson County, as respondents claimed. There is some petroleum production in the northeast corner of the county, and exploration efforts are underway there as well. (Watkins Tr. 2723; Case Tr. 4524) However, most of the oil production in the county is at least 40 miles from SWS and 60 miles from GVA and GVA II.[38] (Watkins Tr. 2733-35) Texaco has drilled only one well within 25 miles of Van Horn,[39] there is no petroleum production in the county apart from the activity in the northeast corner, and there is no production in neighboring counties. (Watkins 2724)

It is also true, as respondents' brokers represented, that some oil companies have moved into the Van Horn area and obtained leases on nearby land. Texaco, for example, purchased some leases on land in another county within five miles of GVA, but this occurred since April 1979, well after most oil-

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[38] Significantly, the oil map sent to numerous consumers did not disclose the distances between the GVA and GVA II properties shown on the first page and the oil company holdings on page three. Another geographical map in evidence (CX 160(0)) indicates that these areas are separated by at least 60 miles.

[39] Texaco's employee testified that the nearest well to respondents' land the company had drilled was a dry hole. (Case Tr. 4535-36)

related claims were disseminated. (Watkins Tr. 2746) But the land so leased has not been used for exploration. (Watkins Tr. 2755) Some exploration has occurred on or near the subject properties, but the exploration, mostly "seismic" or "geophysical," which does not involve drilling, has also been recent, since 1979 or 1980. (Case Tr. 4534) Most significantly, Lyle Case, a Texaco official, described the area in which respondents' properties are located as "frontier," meaning that they are not known to have commercial amounts of oil and gas, though there is a possibility. (Case Tr. 4533)

The literal truth of some of respondents' oil-related claims is, however, simply not determinative.[40] Instead, we must determine whether the existence of oil activity in Culberson County to which respondents referred had significance for respondents' land and, as their statements implied, increased its investment value.

The record evidence establishes that oil drilling and production were not taking place close to the land respondents sold. The physical distance between oil companies' production activities and the subject properties suggests that these activities have little bearing on the likelihood that oil might be discovered near GVA and GVA II, and therefore do not influence the land's value. This is confirmed by the testimony of Texaco's official that respondents' land is "frontier," which means there was a substantial risk that oil would *not* be found on or near the land. Similarly, the record demonstrates that oil company

[40] The law has long recognized that literally true statements may nevertheless convey misleading impressions. *See Rhodes Pharmacal Co. v. FTC*, 208 F.2 382, 387 (7th Cir. 1953), *rev'd to reinstate Commission's order*, 348 U.S. 940 (1955); *P. Lorillard Co. v. FTC*, 186 F.2d 52, 58 (4th Cir. 1950); *Raymond Lee Organization, Inc.*, 92 F.T.C. 489, 626 (1978), *aff'd* 679 F.2d 905 (D.C. Cir. 1980). For example, in advertisements for respondents' products, statements about other, similar products may mislead consumers as half-truths or as deceptive implied representations that the statements apply equally to all products, including respondents'. It is thus irrelevant to argue, as respondents appear to do (RAB 19), that complaint counsel here failed to carry their burden of showing the falsity of statements about land *other than* respondents' on which oil exploration may be occurring. Respondents used those statements to represent inaccurately that *respondents'* land had substantial investment value because of the presence of oil and oil-related development.

exploration and leasing activities near the GVA and GVA II sites were neither extensive nor successful in locating oil reserves. These facts belie respondents' assertion as to the record's failure to show that nearby oil activity has not increased this land's value. (RAB 19) In the context of this evidence, we find that the repeated references to oil production in the county by respondents and their brokers distorted its proximity and exaggerated its significance so that the representations were inaccurate and therefore misleading. *See P. Lorillard Co. v. FTC*, 186 F.2d 52, 58 (4th Cir. 1950).

Representations by respondents' brokers were often more pointed than simple statements about the existence of drilling and exploration work nearby. Sales representatives on many occasions stated overtly not only that there was oil activity in the region but also that this made respondents' land more valuable and a good investment with little or no risk. The record evidence contradicts these claims. The investment value of respondents' land could only be enhanced if oil were likely to be found on the property or nearby. Yet the testimony of a Texaco official established that this is an exceedingly remote possibility. The likelihood that the land would be purchased and used for workers' housing as some sales representatives asserted is equally slim. Exploration and production efforts were neither close nor extensive enough to warrant purchase of the land for these purposes. Representing that local oil-related activities made respondents' land a valuable low-risk investment was therefore inaccurate and misleading. *See AM-REP Corp.*, 102 F.T.C. 1362, 1640-41 (1983), *petition for review filed*, No. 84-1434 (10th Cir., April 2, 1984).

Respondents also represented orally and in writing that their land was a good investment because of other potential or likely commercial developments in the area,[41] including the

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[41] Respondents argue that they neither distorted nor wrote the news articles about local commercial developments and that they were true. However, as we noted above, true claims, including statements accurately drawn from newspaper accounts, may nevertheless convey misleading impressions to consumers. *See P. Lorillard Co. v. FTC*, 186 F.2d 52, 58 (4th Cir.

*(footnote continues)*

proposed construction of a nuclear power plant. For example, respondents reproduced for consumers excerpts of news articles describing how a group of electric utilities had purchased land and water rights near SWS for possible construction of a power plant and stating that then-President Ford proposed that private uranium fuel plants be publicly financed. (CX 93) However, respondent Kritzler admitted that the group that purchased the site "never said that they have a direct proposal to build the power plant," and he conceded that they "had no date in mind as yet." (Kritzler Tr. 560) The absence of a concrete plan or timetable for construction of a power plant made it highly unlikely that purchasers' land values would increase as a result of this development, or that the development itself would ever take place.

Similarly, respondents' allusions to other commercial and industrial developments, including construction of a processing plant to make guayule rubber, provided an exaggerated sense of the land's value. Though respondents repeatedly emphasized Congress' authorization of $30 million to develop a guayule industry, they failed to mention that no money was ever appropriated for this purpose. (ID 360) Moreover, complaint counsel's expert witness, Daniel Bragg, painted an extremely negative picture of the likely development of a commercial guayule industry resulting both from the difficulty and expense of raising the guayule plant and from the lack of demand for guayule rubber. (ID 361-68) He also noted that no guayule processing or extraction plants currently exist. (I 366) This evidence leads us to conclude it is highly improbable that the potential for development of a guayule industry in

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*(footnote continued)*

1950). Respondents used these materials moreover not simply to inform consumers as to possible developments of general interest, but to encourage them to continue their payments on existing land or to consider additional purchases. In this context, respondents' intended message was clearly that the developments reported in various news accounts enhanced the value of respondents' land and made its purchase worthwhile. As to respondents' asserted lack of involvement in writing the articles describing local commercial developments, we note there is some evidence that respondents annually paid for one Chamber of Commerce brochure they used in marketing. (CX 219; Mitchell Tr. 3745)

southwest Texas enhanced the value of respondents' property. Accordingly, we find respondents' representations that commercial developments, including construction of a nuclear plant or establishment of a guayule industry in the area, render their property a more valuable investment to be inaccurate and exaggerated and therefore misleading.

**3. Disclosures**

Neither respondents nor their brokers disclosed the substantial risks associated with investing in their land. Nor did they reveal the difficulty consumers might have reselling their interests in the land or recouping their original monetary investments. Indeed, respondents' stated position was that they were selling use, not investment (Kritzler Tr. 4103), so that warnings about the riskiness of the land as an investment were not, in their view, warranted.[42]

Respondents implicitly acknowledge that sales representatives made investment representations to prospective purchasers without disclosing the riskiness of the investment. This is evident from respondents' practice of recontacting after purchase some customers to whom investment representations had been made in order to inform them "we cannot tell you there would be any profitability in the purchase of this land." (Kritzler Tr. 597) Such disclosures, had they been made prior to purchase, might have cured what otherwise were significant omissions of information about the land consumers contemplated buying.[43] The record makes clear instead that re-

[42] Respondents also argue that they had no responsibility "to disclose facts which are already known to purchasers." (RAB 22-23, *citing FTC v. Simeon Management Corp.*, 532 F.2d 708, 716 (9th Cir. 1976)). While this may ordinarily be true, it does not follow that respondents had no obligation here to inform consumers about the uncertainty and risk associated with the purchase of their land since we have previously found that, in the absence of disclosures, respondents' marketing program represented that their land was a good, low-risk investment. *See* Section II.A.2., *supra.*

[43] Whether presale disclosures would indeed have cured this deception we need not determine, since we find that adequate disclosures were not in fact made. However we note that the timing and format used to effect disclosures may be such that they do not successfully remove the deception. *See Peacock Buick, Inc.*, 86 F.T.C. 1532, 1562-63 (1975), *aff'd.* 553 F.2d 97 (4th Cir. 1977) (opinion unpublished).

spondents' oral and written investment representations portrayed the land as a profitable and safe investment yet failed to inform consumers before they purchased of the riskiness of the land as an investment. Because consumers had contrary beliefs about their purchases created by respondents' own actions—we conclude that respondents' failure to disclose these facts was misleading.

### C. Land Use Representations

Count II of the complaint (paragraphs twelve through fourteen) charged respondents with promoting their land as suitable for use by purchasers as homesites, farms and ranches when in fact it was not suitable for such uses and respondents did not disclose facts bearing on its suitability. The principal land use representations made in respondents' promotional literature and in oral discussions with prospects concerned use of the land for residential, farming, ranching and other agricultural purposes. The fact that the land was promoted for these uses is not in dispute, but the exact meaning or import of the promotional claims is.

#### 1. Use as Homesites

Respondents admittedly represented to potential buyers that parcels they sold could be used as homesites. (ID 135, RAB 39, 45-46) Such representations were made repeatedly in the printed materials prepared by respondents and given to potential purchasers. For example, in the SWS brochures, potential buyers were told they could use the land as a "country estate": "Today more and more families are denouncing the hectic pace, the polluted atmosphere and overcrowded conditions of the cities in favor of a quieter, more peaceful, relaxed and meaningful existence. Your five acres of land could be a haven for you and your children." (CXs 86I, 87J) The "artists' conception" of the "estate" depicts a substantial house with a swimming pool, tennis court, fenced horse pen, and stables. (*See also* CX 88J (describing "country estate" in GVA and GVA II brochures)) We conclude respondents expressly represented that their land was suitable for homesites and in particular was suitable for elaborate residential uses.

**2. Farming Uses**

Respondents made several references in their promotions to purchasers' ability to farm, garden, and raise produce on the properties. Complaint counsel argue that the properties were represented as "farmland" suitable for "productive farming," when they were not suitable for that use because of high costs. (CCAB 27-30) Respondents counter that consumers were not told that they could operate a "commercial" farm on five acres, but that they could "earn modest amounts of money by selling some of their produce." (RAB 39)

The record indicates that consumers were told they could grow vegetables and other crops for their own consumption as well as for sale to others. Indeed, numerous references in respondents' advertisements and promotional brochures described the land as suitable for farming or orchards and not simply for personal gardening or small-scale growing.[44] (CXs 53, 54, 56, 57, 66, 69, 71, 86, 87, 88, 89) This point was reinforced when respondents referred to farming as a major industry in the area, informed prospects of commercial farming operations underway nearby, and noted the existence of a "railhead" nearby, presumably for those who wished to ship produce to market. (CXs 83-85, 86-89, 90, 92, 100)

Respondents' promotional statements also suggested that use of the land for farming would be profitable as enough produce could be raised to supply a purchaser's own needs and sell to others. The profit represented was not merely extra pocket money, but enough to make consumers self-sufficient. For example, many of respondents' advertisements raised the possibility of owner self-sufficiency on five-acre parcels through such phrases as "become financially independent on your own five-acre farmette" and "buy independence and protect yourself against inflation at the same time!" (CXs 42, 43) Similarly, an advertisement stressed that the land would grow produce "for your *own* table as well as for sale to others." (CX 58; *see also* CXs 59, 60) And a newspaper article sent to prospective and

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[44] While most advertisements focused on the farming potential of the land, one series featuring actor James Drury spoke not of farming but of gardening. (CXs 61B, 64)

actual purchasers of the land envisioned the area "producing tremendous food supplies for the nation" and spoke of small plot owners making a "doggone good living producing vegetables, fruit, or whatever." (CX 91)

Because the references to farming always related to the small parcels respondents sold, we do not believe respondents represented that large-scale commercial farming operations of the sort requiring extensive acreage could be conducted on the individual parcels. Instead, respondents' assertions expressly represent that sufficient produce could be grown to meet personal needs and to sell for at least subsistence level living. In addition, under the legal analysis described in Section III, *infra,* we conclude that, in conjunction with the various investment representations described above, respondents' farming representations implied that potential uses of the land for farming-related activities made it a good investment.

**3. Ranching Uses**

A variety of respondents' marketing materials stated the land could be used for raising cattle. Complaint counsel assert that this meant the land "could be used to ranch, which involves raising more than one or two cows." (CCAB 33) Respondents counter with the ALJ's conclusion that "what respondents are saying is that it is possible to raise enough beef on the land to feed one's self or one's family." (ID 156; RAB 45-46)

We cannot accept complaint counsel's assertion that respondents claimed more than one or two cows could be raised on a five-acre parcel. Respondents admit that they made representations about raising cattle for home consumption. (RAB 45-46) Typical of their representations is a television advertisement which stated that consumers could "raise beef on . . . [the land] and have enough of everything for your own table." (CX 51; *see also* CX 50 ("raise livestock and put beefsteak back in your food budget")) While it is true that respondents also called the land "ranch land" in advertisements and materials (ID 156), the context of these statements does not suggest respondents were recommending that purchasers

could use the land for commercial ranching purposes.[45] We conclude that respondents expressly represented that one or two head of cattle for personal consumption could be raised on the land by grazing or ranching. We also conclude under the legal analysis described in Section III, *infra,* that respondents' references to ranching, made in conjunction with claims that the land was a good investment, impliedly represented that the land's potential usefulness for raising cattle made it a good investment for consumers.

**D. Accuracy and Completeness of Land Use Representations**

The complaint charged in Count II that respondents' representations about the uses for which the land was suited were misleading because of the unavailability and high cost of obtaining utilities, water, and other amenities, because of respondents' failure to install promised improvements, and because of other practices by respondents that impaired purchasers' use of their land. We consider these charges from two perspectives. First, respondents' representations about the land's suitability for residential, farming and ranching uses may be misleading because the land is not suitable for those purposes on a practical, economic basis. Second, respondents may have misled consumers by failing to disclose material information concerning the high costs and risks associated with using the parcels as they represented.

Whether respondents inaccurately represented that their land was suitable for residential use does not depend, as the ALJ suggests, on whether "no insurmountable obstacles" to residential use exist. (ID p. 114) Instead we must determine

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[45] This land was "ranch land," used to raise cattle commercially, some time before respondents bought it. (ID 14, 21) However, it appears unlikely that it will ever be used for commercial ranching in the future because of the problem of fractionalization that we noted in *Horizon Corp.*, 97 F.T.C. 464, 819 (1981). Once this land is divided into thousands of small parcels it is unlikely ever again to be combined into the single large parcel that might be attractive to a commercial rancher. (Conoly Tr. 1060) Commercial ranching requires a minimum 10,000 acre parcel (Holtz Tr. 3064), so for this land to be used as a commercial ranch again would require the accumulation and joinder of hundreds of parcels and the assent of all their owners.

whether as a practical and financial matter residential use of the land was a suitable, feasible undertaking. Similarly, our consideration whether respondents misled consumers as to the suitability of their land for farming and ranching does not end with the ALJ's finding that some "individuals have taken substantial strides towards self-sufficiency." (ID p. 115) Instead, as above, we must consider whether the land was practically and economically suited for these uses and whether evidence about impediments to agricultural use belies the particular land use and self-sufficiency representations respondents made. We now turn to an examination of the evidence in the record on these points, considering first the availability and cost of water and utilities, then the land's suitability for the three uses represented, and finally the sufficiency of the information respondents disclosed to consumers.

**1. Availability and Cost of Water**

The center of disagreement over water is not whether an adequate supply was physically available, but whether it was available at a cost that made the represented uses of the land economically feasible. The ALJ made extensive findings as to the testimony about well costs for residential and farming purposes. (ID 224-53) Estimates of what it would cost to put in a well were made by several witnesses. Most stated that the price of a well to supply water for domestic needs would be between $5,000 and $10,000. (Wharton Tr. 3577 ($7,000 to 8,000 in 1980 for commercial driller); Holtz Tr. 3098 ($5,000 to $10,000); Muller Tr. 3637 ($10,000 in 1980 for 600-foot well); Sanchez Tr. 3700 ($10,000 to $12,000 for commercial driller)) However, Kritzler testified that the cost would be somewhat lower, in the range of $4,000 to $7,500. (Kritzler Tr. 628) Costs for running a farming or gardening operation were estimated to be higher because of the need for water to irrigate. The large well hole and more powerful pumps needed for a five-acre farm would cost between $10,000 and $20,000. (CX 532; Stanton Tr. 3153)

We conclude that the costs of drilling wells to supply water to the subject properties would range from $5,000 to $10,000 for domestic use and from $10,000 to $20,000 for irrigation purposes.

**2. Availability and Cost of Utilities**

As the ALJ noted, the physical availability of utilities on the land respondents sold is not in issue. (ID 159) However, we must consider the availability of utilities from a practical standpoint in view of their costs. The ALJ's findings on installation and service costs for electricity, telephone service, and propane gas allow us to determine the range of outlays land owners would encounter. (ID 159-88)

In 1979 the local electric company charged 75 cents per foot, or $3,960 per mile, to extend its lines from existing lines to individuals on the subject properties who wanted to obtain service suitable for a residence.[46] (ID 164) The company extends electric lines one-fourth mile free for each meter that the customer installs. Some of the parcels respondents sold are two or three miles away from the nearest line, while others are within the one-fourth mile free distance. (ID 166) Thus the initial costs of electricity installation in 1979 would have ranged from $20 (minimum charge) to $11,880 (three miles).

Installing electric lines adequate to meet commercial irrigation needs is even more expensive because extensive irrigation

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[46] The record is not clear as to what the company charged in earlier years. Respondents assert that it was 55 cents per foot "[a]t the time respondents were selling the property" (RAB 31) and this is the cost figure respondents included in their GVA and GVA II brochures. (CXs 83C, 85C) However, the electric company employee who testified answered a question as to what the lowest charge was he could recall by stating that he remembered a 55 cent per charge "somewhere back down the line." (Gwartney Tr. 1214-15) It thus appears that the charges for electric service were between 55 and 75 cents per foot during the period respondents marketed land at SWS, GVA, and GVA II. At the lowest rates, 55 cents per foot, the company would have charged $2,904 per mile to extend its lines, compared to $3,960 per mile at 75 cents per foot. This cost was credited to the customer's electric bill over a period of from 18 months to seven years, depending on the cost of the extension (CX 434), so that customers who used enough electricity would in effect pay nothing for the installation apart from the opportunity cost of advancing that sum to the electric company for expenses to be incurred several months or years later. Customers who left the property in the five-year period before the "credit" was used up or who did not use sufficient electric service, however, would forfeit the remaining balance to the electric company. (Gwartney Tr. 1201)

requires heavier duty, three-phase electric lines. In 1979, consumers would have paid up to $5,808 per mile to have these lines installed, or $17,424 to the furthest lots. Monthly electric charges to run motors needed for irrigation are also substantial. The company's maximum charges in 1981 for a 50 horsepower motor used for irrigation were estimated to be $1,256 per month, while the maximum charges for a 100 horsepower motor were estimated to be $2,512 per month.[47] (Gwartney Tr. 1212-13)

The ALJ determined that costs for extending telephone service to most of the properties is "considerable." (ID 176) While the utility company's policy for extending service lines is similar to that for electricity, existing telephone lines are typically somewhat further from the subject properties, so that the maximum costs are higher. Moreover, the charge is not credited against monthly service.[48] An extension to one unit of GVA would cost at least $6,600, and a five-mile extension would cost $11,880. (ID 176)

An individual or family living on the properties who did not wish to use electricity for heat and hot water could use either natural gas or propane gas. Extending natural gas service would cost from $5,000 per mile for residential service to $6,000 per mile for commercial service, with lots from four to seven miles away. (ID 180-82) A propane tank suitable for domestic service costs $460 plus $70 in installation costs. (Harris Tr. 3018) A larger propane system for commercial purposes could be purchased and installed for between $975 and $1,489.

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[47] Evidence as to charges for motors of these sizes in earlier years does not appear in the record.

[48] Respondents state in their appeal brief that telephone installation costs are refundable against telephone bills, but they do not cite to any evidence establishing that proposition. (RAB 33) Our review of the Initial Decision and the testimony of Ronald Ethridge, Customer Service Manager of Continental Telephone Company (Tr. 2763-94), indicates no basis in the record for this contention. Rather, it appears that telephone line extension costs are not credited against monthly service; instead "it is a one-time fee." (Ethridge Tr. 2779)

The complaint also alleged that the high cost of obtaining financing, equipment, improvements, and other amenities on the land made it unsuitable for use as homesites, farms or ranches. We disagree with the ALJ's finding that the record contains little evidence regarding the unavailability of financing. We believe the record demonstrates the difficulty of obtaining financing on the land.[49]

With respect to the unavailability and cost of other amenities, evidence in the record shows the cost of equipment needed to run small and large farming operations. As the ALJ found, ordinary landowners cannot afford the sort of equipment used on large farms but can afford the size and type of equipment appropriate to farms of five to forty acres. (ID 256-57) There is also evidence that the golf course respondents promised to build on SWS was built, washed out by floods, rebuilt, ruined by drought, and then not rebuilt, in part because of the low level of owner interest in it. (ID 262-68) Respondents made some efforts to stake parcel boundaries as they had promised GVA and GVA II landowners. However, several witnesses testified that their lots were not staked and that they had difficulty finding them or determining their boundaries so that fences could be installed. (ID 273-75) The record indicates that roads which respondents promised to construct were in fact built. (ID 28081, 285-88) By contract respondents were not obliged to maintain the roads at GVA and GVA II. (ID 279, 286)

Finally, the complaint alleges that other of respondents' practices made the property they sold unsuitable for use as homesites, farms and ranches. Complaint counsel's case on this allegation relied principally on respondents' failure to maintain

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[49] The testimony of Ronald J. Stuard, branch manager of a local savings and loan, established that the bank denied loan requests by a dozen landowners and had a policy of refusing loans where property at SWS, GVA, or GVA II would be used as collateral. (Stuard Tr. 3129-31) This was because, in the bank's view, the cost of utilities was too excessive to warrant a loan and because the bank feared that the land could not be sold in a foreclosure proceeding for the amount the purchaser had invested. (Stuard Tr. 3131-32) Two consumers who unsuccessfully sought loans from financial institutions in the Van Horn area also demonstrated that loans using the property as collateral were not available.

improvements on the land and their practice of allowing cattle to graze on the properties. Improvements to the land, including a golf course and roads, are discussed above. With respect to respondents' leasing of the land for grazing, we cannot accept the ALJ's conclusion that this practice did not impair owners' use of the land. (ID 292) His conclusion stemmed in part from the view that owners could install fences to keep cattle off their property. But given the acreage of these parcels, fencing is an expensive undertaking. The record shows costs of $2,500 per mile to install fences on the property. (Holtz Tr. 3065)

**3. Suitability for Use as Homesites**

We do not dispute that respondents' land is physically capable of being used as a homesite, that utilities are physically available to be installed at the sites, and that some consumers reside on their parcels. But it frames the issue too narrowly to focus only on the land's physical capabilities and the theoretical availability of utility service without regard to economic realities and the disincentives that extremely high costs presented to owners who wished to develop and improve the land in order to make it physically appropriate for the sort of residential use respondents promised. It is probably not possible or desirable to establish a bright line beyond which development costs make use of land for a particular purpose impractical. However, from the evidence in this record, we conclude that any sensible analysis shows that the inordinately high costs to provide water and utility service to the land at issue here render the land unsuitable and financially impractical for residential use as respondents represented.[50] We therefore find respondents' rep-

[50] Complaint counsel argue that the fact that only a few purchasers live on the land confirms that it is not suitable for residential use. (CCAB 26) But many consumers were told the land was a good investment that should be purchased for its investment value, and many did indeed purchase for these reasons. The fact that most consumers who purchased a lot chose not to live on it therefore does not necessarily demonstrate that the land is unfit for that purpose. Similarly, the refusal of various local financial institutions to accept the land as collateral for loans to finance construction does not, in our view, establish that the land is unsuitable for residential use since, as respondents argue, financing may be available through other sources. (RAB 36; ID 255) Indeed, this evidence reflects less on the practical and financial suitability of

*(footnote continues)*

resentations about the land's suitability for use as homesites misleading because they inaccurately portrayed the economic suitability of the land and its investment value.

The critical limitations on the land's fitness for use as homesites stem from the costs of preparing it for such use. While we have not determined the "average" or typical expense of developing a parcel, we have considered the range. Respondents suggest a cost of $8,500 to install a well, electricity, and a septic tank; housing and telephone services [51] would be additional. (RAB 33) On the other extreme, for parcels more removed from existing utility service and for owners desirous of a more traditional homesite, a consumer's expenditure might well exceed the $50,000 estimated by the ALJ. The total expenses consumers could encounter include the cost to drill a well, provide a septic tank, extend electric and telephone service, provide propane gas, and fence the property to keep out grazing cattle.

These costs should not be evaluated in the abstract, however, but should be related to the representations respondents made. Respondents did not market their land as suitable

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*(footnote continued)*

the land itself for use as homesites than on the relatively low market value of the land compared to its selling price, supporting our conclusion *supra* that representations about the land's value as a good, low-risk investment were inaccurate. Accordingly, our conclusions about the land's unsuitability do not rest on these arguments.

[51] Respondents in their appeal brief "caution" the Commission "that it would be an improper exercise of Commission expertise to determine in the absence of evidence that consumers will believe a telephone is a necessity. It must be considered that the people who choose to live on these properties do so in part to avoid such things as telephones. . . . These are not people who consider it important or desirable to have a telephone ringing at all hours." (RAB 32 n.23) Respondents may or may not be right in their characterization of some of the "people who choose to live on these properties," but we do not need to determine that telephone service is a necessity in order to consider its expense in determining the suitability of these parcels as homesites for personal use or investment and resale purposes. To the extent the cost of telephone service is sufficiently high, information as to its expense may need to be disclosed to avoid misleading consumers deciding whether to buy this property for the represented uses.

for spartan or subsistence level living. The brochures depicted instead large, developed, irrigated homesites with substantial houses described as "country estates." The expense of developing the property for this sort of use would, we conclude, be on the high end of the scale, particularly for those sites some distance away from existing utility lines and for those who expected a large country estate to have a telephone on it.[52] In view of these representations, we do not find evidence of a few consumers who either absorbed the high costs of utilities or avoided them by doing without in order to live on the land in mobile homes persuasive evidence that the land is suitable—practically and financially—for use as homesites in the fashion respondents represented.

We note that this result is consistent with the Commission's decision in *Horizon Corp.*, 97 F.T.C. 464 (1981). There we found that costs of drilling a well in one development which could be "as great as" $12,500 contributed to a determination that utility costs were "prohibitive to the ordinary consumer." *Id.* at 830; *see also id.* at 728 (Initial Decision). At another development considered in *Horizon*, well costs of $3,500 to $5,000 contributed to a finding that utility costs were "prohibitive." *Id.* at 834 & n.47. At a third development, well costs of $4,500 supported a finding that utility costs were "prohibitive." *Id.* at 836 & n.52. Similarly, costs of up to $31,680 to extend utilities to properties four miles from existing lines, and costs of $10,000 per mile to extend electricity service, were considered unacceptable. *Id.* at 834 n.47, 836 n.52. The total expenditures the ALJ found consumers would encounter in preparing to live in mobile homes on the property were "well under $50,000." (ID 295) Even accepting this estimate (which would be low for many consumers' parcels), the amount of

[52] In light of these depictions of the land being used for residential purposes, we find unhelpful respondents' estimates of the costs of residential use for a consumer living in a mobile home without a telephone. (RAB 32 nn.23, 24)

money required approaches the level we found to be "prohibitively expensive" in *Horizon*.[53]

**4. Suitability for Use as Farms**

The record is replete with evidence that the land at SWS, GVA, and GVA II is fertile and, with irrigation, can produce a wide variety of crops. (ID 297-315) Yet there is also considerable testimony about the difficulty and risk of farming in that area. (ID 328-34) Vegetable farming in Culberson County for other than personal consumption appears to be very rare. Less than one percent of the land in the county is being farmed and there are only 16 to 17 "commercial" farms in the county. (Holtz Tr. 3034, 3042) Several individuals have tried vegetable farming, but testimony indicated only infrequent financial success. (Gunter Tr. 2900, 2906, 2890) The difficulties of climate, pest control, flooding, and the critical need for irrigation mean that farming in the area is risky and requires extensive experience. (ID 329-30; Harlow Tr. 2935) Although the county agricultural agent believed that many vegetables could be grown commercially, he testified that the smallest parcel on which an individual could farm profitably as a commercial venture is 350 acres. (Harlow Tr. 2987, 2955; *see also* Holtz Tr. 3054 (300 acres needed to "make a living" farming); ID 327) The record reflects the virtual absence of any local market for produce. (ID 331; Harlow Tr. 2951) The nearest market for vegetables is in El Paso, 120 miles away. (ID 331)

It thus appears that profitable commercial farming is at best a risky endeavor on large size parcels. Whether farming

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[53] *Id.* Respondents argue that the total costs to develop a lot in *Horizon* could have been as much as $500,000, so that that case is not comparable. (RAB 35) While it is true the potential development costs at one Horizon property might have been that high, costs at other properties were not. For example, at Arizona Sunsites the cost of water and electricity service could have been up to $36,680 for a parcel four miles from existing lines. *Id* at 834 n.47. At Whispering Ranch, water and electric service to a parcel one mile from existing lives would have cost $17,500. *Id.* at 836 n.52. Respondents appear to have overlooked these portions of our decision in *Horizon* as well as our conclusions that utility costs at Arizona Sunsites and Whispering Ranch were "prohibitive."

for a profit is feasible at all on smaller parcels of the size sold by respondents remains a highly contested question. The ALJ made extensive findings as to farming pursuits that could be profitable on smaller parcels and then concluded that some individuals had taken "substantial strides towards self-sufficiency." (ID 335-55 and p. 115) However, it does not appear that any individual actually makes a living off the land. Moreover, the evidence as to potential small acreage farming uses persuades us that the land is not financially and practically suited for profitable farming operations and economic self-sufficiency.

We have already considered the costs of utilities, water and other improvements as they pertain to development as a homesite. Costs for developing a farming operation—or even a gardening operation—are of course higher than for development simply as a homesite, because of increased water and electric use demands. Consumers face costs of $10,000 to $20,000 for a well large enough to serve irrigation needs and expenditures of $17,424 (in 1979) to $26,928 (in 1981) for a three-mile extension of electric lines suitable for irrigation uses (though some of the latter expenditures might be offset against consumption costs). Added to these substantial utility costs are the costs of buildings and equipment that would be needed to engage in a farming operation, which could range from a few hundred dollars to $4,500. (Wharton Tr. 3617; CX 532) Also increasing the total costs are the high monthly charges for running irrigation motors and the expense of installing a fence to keep out grazing cattle. A consumer's outlays for water, electric service and equipment necessary to farm the land at SWS, GVA, and GVA II could thus far exceed $50,000.

We believe these unusual and steep developmental costs for parcels of the size respondents sold make the land impractical and unattractive for the sorts of small-scale farming operations respondents represented. On a large-scale commercial farm, expenses of this level might be warranted since they could be spread over much larger acreage and production.[54] But

[54] Indeed, testimony in the record as to the minimal acreage needed for commercial farming reflects the fact that high capital costs must be offset against large volume for the undertaking to be profitable.

respondents here represented that consumers could live on the land, producing enough food to meet their personal needs and to sell to others in a fashion sufficient to sustain at least subsistence level living. It was inaccurate and therefore misleading to represent the land in this manner when these uses could require initial development expenditures greater than $50,000 and when the risks and costs of farming in the area and the absence of local markets for produce mean that revenues from farming may be small or nonexistent.

The ALJ relied heavily on evidence of consumers who were living on the land and producing some food. However, the testimony of these witnesses makes clear that even after the land had been developed and substantial expenses had been incurred, their personal consumption needs were not completely satisfied. These consumers were, moreover, atypical in that they managed to avoid the costs of drilling to obtain water on their parcels, a practice most purchasers would be unable to repeat.[55] Similarly, the nearby Powell Farms, cited as producing a wide variety of crops, was apparently in financial difficulty and not making money. (ID 298; Compere Tr. 3465)

The ALJ also pointed to other record evidence shedding light on the earnings landowners could expect from using small parcels of the land to raise pecans and grapes.[56] The ALJ found that after five years during which there would be no profits, farmers could make $1,000 to $1,500 per acre by raising and selling grapes. (ID 343-45) However, initial expenditures of $70,000 plus the cost of a well would need to be made, and profits would be far from certain because of the risks involved

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[55] One consumer with "extensive experience" in farming raised enough vegetables in a 40- by 15-foot garden to supply half of his diet. (Wharton Tr. 3582, 3585) This was accomplished by using water from a nearby well on respondents' property so that the expenses of irrigation were avoided. (Wharton Tr. 3603) This consumer also described plans to raise chickens, hogs, corn to feed the hogs, and a calf sometime in the future. (Wharton Tr. 3585, 3590, 3595) Another witness, a SWS employee who also used water from a well drilled by respondents, testified that he was not self-sufficient but that his quarter-acre garden permitted him to live on a salary of $900 per month. (Gilmore Tr. 984)

[56] The ALJ appears to agree that such exotic plants as guayule, jojoba, and euphorbia may not be grown for profit in this area. (ID 357-68)

in production and because there is no market for grapes in the Van Horn area. (ID 345; Campbell Tr. 3671, 3673-74, 3678-79) Similarly, the ALJ found that pecans would yield a profit but not until the sixth year of production and then only in amounts of $462 per acre, and $600 per acre the following year. (ID 350) In view of the high initial development costs required to prepare the land for farming, the risks of farming, and the lack of a ready market, we are not persuaded that this testimony on the theoretical profits to be made from raising grapes and pecans on the land establishes that these lots can provide consumers with subsistence level self-sufficiency in a practical and financial sense.

As we noted above, respondents also promoted their land as a good investment because of the farming activities they claimed could be undertaken on it. However, the record evidence from knowledgeable witnesses is that the minimum acreage for a commercially profitable farm is 160 to 400 acres and the average farm size in the area is approximately 1,400 acres. (ID. 327) Moreover, respondent Kritzler testified that growing crops on small acre parcels is not commercially feasible. (Kritzler Tr. 633-35) These facts establish that small parcels of respondents' land would not be a good investment to resell to others interested in commercial farming operations, since literally hundreds of such parcels would have to be patched together to reach a minimum size for commercially profitable farming pursuits. Nor is the land a good investment for resale to others interested in small-scale farming and self-sufficiency, since the costs and risks associated with such farming are such that the land in its undeveloped state is not practically suited for these uses.

We conclude that respondents' representations that its land is suited for small-scale farming uses sufficient to meet personal needs and to sustain subsistence level living were misleading because they were inaccurate. We also conclude that in suggesting that the land's potential use for farming enhanced its investment value, respondents inaccurately portrayed its worth and risk as an investment.

**5. Suitability for Ranching Uses**

Respondents claimed that the parcels they sold could be used to raise one or two head of cattle—or enough to provide beef for personal consumption—because cattle can graze on the property. Yet the record indicates that this arid, semi-desert land is capable of supporting only six to ten head of cattle for each 640 acres of grazing area. This means that between one-twentieth and one-twelfth of a cow could be raised on a five-acre parcel of land.

Cattle can of course be raised on the property, but only by importing feed and providing them virtually "everything they eat" by "running a miniature feed lot," which is expensive. (Holtz Tr. 3065) We find it is misleading to suggest to prospective purchasers that cattle can be raised on the land when this is only true if consumers purchase and feed the cattle most of their needs. Indeed, one might well claim that a five-acre parking lot was suitable for raising cattle if the accuracy of marketing claims were so evaluated.

Respondents contend their claim that one or two head of cattle may be raised on the land is true and is proved by the testimony of Mr. Sanchez, who "with eighty-eight acres in GVA is currently raising twenty-five cows," and Ms. Smallwood, who "raised as many as five or six horses on ten acres in GVA." (RAB 46) Respondents' wording of the statement about Sanchez conceals one important fact: Sanchez is not raising 25 cows on 88 acres. Mr. Sanchez does own at least 80 acres in GVA, and he does own 25 cows. (Sanchez Tr. 3688-89) But he does not raise the cows on his 80 acres because they are allowed to roam over the entire GVA parcel so that in effect he is raising 25 cattle on up to 15,000 acres of GVA. (Buck Tr. 1531; Sanchez Tr. 3708) As a practical matter, if more than a few consumers raised cattle on GVA it would soon be unable to support them since the entire property is only 15,000 acres which could sustain only a few hundred head of cattle under the ratio set out above. As for Ms. Smallwood's testimony, she lived on the land only six months a year, which casts doubt on respondents' assertions that horses were "raised" on the land.

In addition, it is simply not credible that "five or six" horses were raised on 10 acres of land without supplemental feed.

The ranching use representations respondents made to consumers also communicated that the land was a good investment because it could be used for ranching and presumably sold to others who engaged in ranching. Respondents Gross and Kritzler conceded, however, that commercial ranching on the parcels was not practicable. (ID 158) According to one witness, the minimum acreage required for commercial ranching is 10,000 acres, which will support 100 head of cattle and provide a very low income. (Holtz Tr. 3063-64; ID 369) Ranchers interested in buying this land for ranching purposes would thus need to combine hundreds or possibly thousands of lots to secure a sufficiently large area to sustain grazing cattle, making this a difficult and unattractive investment alternative. (Conoly Tr. 1060) Moreover, the record reflects that large acreage ranch land is generally valued and sold at prices much lower than consumers here paid,[57] so that resales of this land to others interested in commercial ranching would be unlikely, at least at prices allowing consumers any profit on their sales. We therefore conclude that respondents' ranching and investment-related representations inaccurately described the land, its suitability for raising cattle, and its value as an investment stemming from its potential for ranching activities.

**6. Disclosures of Information**

Respondents generally did not disclose to consumers the costs per unit to install various utilities, the estimated costs of bringing services to the parcels consumers were considering buying, or the estimated costs of bringing service to the furthest parcels. This information does not appear in respondents advertising scripts and the subject was apparently avoided in

[57] Complaint counsel's experts placed the value of rural ranch land at well below $100 per acre. Martha Conoly valued respondents' property as rural ranch land worth between $50 and $75 an acre. E.T. Compere valued respondents' land, if sold in large tracts, at between $35 and $80 an acre. (ID 400, p. 98 n. 67).

oral sales presentations by respondents and their brokers.[58] Similarly, respondents' written materials generally do not disclose information about the costs of utility service with the exception of the fact sheets, discussed *infra*, which contained some information about utilities but little about costs. Nor did respondents alert consumers to the factors concerning the unsuitability of the lots to be used as respondents represented for homesites, farms, and ranches. Respondents simply did not reveal orally or in writing the risks associated with the land uses they promoted.[59]

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[58] Respondents' policy as to what information on development costs would be presented by its sales personnel was summarized by Ted Rose, who was the sales manager in respondents' Houston office:

> Q: Aside from the information in the fact sheet, it wasn't your policy or the policy of the subdivider respondents that you would disclose . . . information [on costs other than that in the fact sheet] to consumers?
>
> A: No sir. We always looked at it—*we tried to oversimplify it*, and that is the way we treated it. We were in the land business. We were selling land. That is what we advertise, and that is what we sell. We didn't sell utilities nor water wells or anything else. We sold them a piece of dirt. And if they wanted to know anything about drilling water wells, they were told to contact the local well driller, whenever they go out there and see their property.

(Rose Tr. 713-14 (emphasis added)) Sales representatives would have found it difficult to supply this information if they had wanted to since they simply did not have it. Indeed, one sales representative testified that he had "no way of knowing" the costs of utilities. (Novaez Tr. 870) Respondents' brokers had even less ability to provide this information when asked. The telephone scripts they used (CXs 123-125) confirm that information about utilities and their cost usually was not provided to prospects orally. (*See also* Porter Tr. 2333-36). In addition, Porter Realty sales representatives had no information about the cost or availability of utility services other than what was in respondents' fact sheets. Sales representatives were not instructed to disclose the costs of utilities and did not know what they were. (Porter Tr. 2336) None of Porter Realty's sales representatives ever visited the land they sold. (Porter Tr. 2262)

[59] Potential buyers who expressed an interest in using the land to raise produce were not advised of the expenditures that had to be made to undertake that activity, although sales representatives showed consumers a report (CX 220) stating that the soil was fertile and materials indicating that farming was a suitable way to use the land. (Hammer Tr. 667) Potential buyers who expressed an interest in using the property to raise cattle also were not advised of the costs of that activity. (Hammer Tr. 669) Respondents' advertisements and promotional materials were also silent on these points.

The ALJ concluded nevertheless that the information respondents supplied was sufficient to permit consumers "to inquire further, depending on their interest." (ID p. 114) The effect of this reasoning is to remove from the developer the burden of disclosing significant facts about the property by simply providing addresses of utility companies and other innocuous information, such as that contained in the fact sheets, even after the developer has promoted the land as suitable for various uses for which high utility costs might be encountered. Information of this nature is clearly critical to consumers contemplating a purchase decision.[60] Consumers who desired to use land they bought as homesites might have reconsidered had they known that telephone service, electric service, water and other amenities could be extremely expensive, especially relative to the cost of the lots. The same is true for consumers planning to use their land for small-scale farming and ranching; information about very steep initial development costs to prepare the land to farm and the high risks of raising crops in the area, and knowledge of the need to provide expensive supplemental feed to engage in ranching on the property, may well have deterred those purchasers who believed these activities could be pursued easily and cheaply and with little additional expenditure over the purchase price of a lot.

These beliefs were encouraged by respondents who represented the land as suitable for these uses in a practical and financial sense and, moreover, promoted it as a good, valuable investment. Numerous statements along these lines appeared in respondents' advertising and promotional materials. To further communicate the point, respondents showed consumers pictures of improved and irrigated land (for which the substantial costs of development had already been made) to demonstrate in graphic, visual form how the land could be used for the

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[60] Indeed, one of respondents' employees testified that one common reason purchasers gave for requesting refunds was that the land was "too expensive to develop. It was going to cost more than they had the resources to develop. . . . [T]hey found it cost too much money." (Novaez Tr. 894) This strongly supports the notion that consumers consider information about the costs of development material to their purchase decisions.

purposes stated.[61] In this context, costs of development that could be two to ten times the cost of the land are costs that purchasers could not be expected to anticipate, yet that could make a difference in their decisions whether to purchase the land, which lot to buy, and what price to pay.[62]

Respondents argue that to the extent disclosures about the costs of utilities and other amenities were needed they were made in the fact sheets consumers received before purchase. (CXs 79 to 85) We have reviewed these materials carefully and conclude that they do not provide the sort of information necessary to dispel the misleading impression respondents conveyed to consumers about suitable uses of the land. The record also establishes that respondents' policy was to avoid providing additional cost information to prospects in oral sales presentations. The fact that such information was not supplied or known to many of respondents' and their brokers' sales representatives ensured that the information consumers received was limited to the written fact sheets, which we find were inadequate.

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[61] The fact that many of the pictures respondents used were not of their property may have further distorted respondents' representations, creating an additional need for disclosures of developmental and cost limitations. (Smallwood Tr. 4059; W. Smith Tr. 958, 961-62) We also observe that the strong visual and verbal claims respondents made about the land's value and potential uses could have dissuaded consumers from engaging in further search efforts to determine for themselves how valuable the land was and how they could use it. This, too, suggests a pressing need to disclose this information to consumers.

[62] Respondents attach some importance to the ALJ's finding that the record does not reveal any consumer who was deterred from using the land because of the high costs of water and other utilities. (RAB 31) Respondents mischaracterize the finding as concluding that costs never had and never would deter any consumers when in fact the ALJ concluded only that there was no record evidence that this had happened. (ID 170) In view of the fact many landowners purchased for investment purposes rather than for personal use, it is not surprising that no evidence was introduced of consumers whose plans were derailed because of unanticipated expenses. In any event, we need not determine whether any consumers *actually* were misled by respondents' practices. *See American Home Products Corp. v. FTC*, 695 F.2d 681, 687 (3d Cir. 1982); *TransWorld Accounts, Inc. v. FTC*, 594 F.2d 212, 214 (9th Cir. 1979); *Raymond Lee Organization, Inc.*, 92 F.T.C. 489, 626-27 (1978), *aff'd*, 679 F.2d 905 (D.C. Cir. 1980).

The fact sheets disclosed estimated costs to install desired services only with respect to installation of a septic tank, which at estimated prices of $500 to $1,000 may be one of the lowest expenditures users of the land must make. Information about the water supply and other utility services was limited to incomplete clues that would assist consumers only marginally in determining for themselves what expenditures might be required. For example, respondents disclosed in the fact sheets the address of the local electric utility company and, in later versions of the fact sheets, a summary of some of the company's charges for providing electric lines.[63] But respondents' sales approach ensured that consumers did not have the time or the ability to learn the cost of bringing services to their parcels before a contract was signed.[64] The clues respondents included in the fact sheets about other utility services are even less adequate than those relating to electricity.[65] And, though

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[63] The SWS fact sheet did not disclose either the cost per foot or the distance of the furthest lots from existing lines (up to three miles). (Gilmore Tr. 1018) Two GVA fact sheets disclosed that the furthest lot from existing services was two miles. (CX 83C, 85C) In conjunction with the explanation of installation charges at $0.55 per foot after the first one-quarter mile, it was possible for consumers to perform a series of calculations to discover that the fee for providing service to a parcel two miles distant was $3,890. In view of the volume of other information provided to consumers with this information and the magnitude of the expense, we find respondents' disclosure inadequate to warn consumers that obtaining electric service could be extremely expensive.

[64] Significantly, many of respondents' customers lived outside of Texas, sales were made through mail or telephone transactions (Porter Tr. 2325; Kritzler Tr. 566), and most purchasers never visited the land (Gilmore Tr. 491; Novaez Tr. 896; W.D. Smith Tr. 939). This means that buyers could not easily gather information about the parcels from sources other than respondents. Moreover, the only information the contracts contained about the location of individual parcels was the unit or parcel number. (CXs 74-78). Consumers who did not know how far their lots were from existing electric lines would have been unable to compute the company's charges for providing them with service.

[65] With respect to water, the fact sheets stated that piped water was not available and noted that wells could be drilled instead. Costs of drilling were not disclosed; the fact sheets stated simply that the cost per foot varied with the driller and the water table. The fact sheets all discussed the absence of an "in-tract" natural gas system and advised consumers to contact various

*(footnote continues)*

respondents did disclose to purchasers that the land was leased for grazing, they did not mention the substantial costs to install fencing to keep cattle off individual parcels.

Respondents also insist their disclosures were sufficient because, given the variances in cost to provide service to different parcels, they disclosed all that could be disclosed. (RAB 37) Yet respondents did not disclose either enough information for consumers to figure out for themselves the actual costs they would face or the range of costs to different parcels, including the maximum possible. The fact that costs vary does not make this information any less critical and, indeed, it may make it even more important. Respondents had available to them more precise information on water and utility costs. Even considering the variable level of these costs, respondents could have informed consumers of the magnitude and range of expenditures required to develop the land. Their failure to do so represents a failure to disclose material information needed to correct misimpressions they conveyed to consumers and therefore amounts to a misleading practice.

The complaint charged respondents with failing to disclose "material facts" about the land's suitability for use as homesites, farms, and ranches. In addition to the development costs outlined above, complaint counsel cite other undisclosed material facts. With respect to use of the land as homesites, these include the lack of financing and the uncertainty of economic development in the area. With respect to potential farming endeavors, complaint counsel cite the high farm costs involved and the lack of a market for various crops. With respect to potential ranching uses, undisclosed facts include the need to supply ranch animals with the bulk of their dietary requirements.

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*(footnote continued)*

bottled gas companies for information. No addresses were given, though there is only one such company in the area. (Harris Tr. 3017) No information about costs was provided. All of respondents' fact sheets also referred to telephone service. Buyers were advised to contact the telephone company and an address was provided. No estimates for installation of telephone service were given.

The record contains evidence both of the inability of consumers to obtain financing using their lots as collateral and their ability to obtain loans in other ways. Respondents did not make representations about the availability or cost of financing improvements to the land they sold. In addition, the record does not reflect that financing of development costs through loans on the undeveloped land is a common or expected procedure in this area or elsewhere, and we are unable to so presume. In our view, the land's virtual uselessness as loan collateral reflects more on its poor value and lack of resale potential than on its unsuitability as a homesite. We cannot conclude that respondents misled consumers in failing to disclose the unavailability of financing on the land.[66]

Material facts complaint counsel allege were not disclosed in connection with farming land use representations include associated costs and risks. In assessing the land's suitability for use as farmland we found that farming is a risky, difficult, and expensive proposition in the Van Horn area. We also found that raising grapes and pecans on the property as respondents suggested entailed considerable risks, substantial initial development costs, and a low return after several years without any profits. We found that there was virtually no local market for produce in the area. All of these factors posed significant obstacles to consumers' ability to use their land profitably for farming, to produce food for their own consumption, and to become self-sufficient. Because respondents represented the land was suitable for these uses, consumers would not have anticipated that such significant barriers to use existed; respondents' failures to disclose these costs, limitations and risks were, accordingly, misleading.[67]

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[66] We also are unable to conclude that respondents' practices in constructing and maintaining roads and the golf course at SWS misled consumers.

[67] Complaint counsel also argue that respondents failed to disclose that the parcels were too small for use as farms and ranches. We do not believe respondents represented to consumers that these parcels could be used for large-scale commercial farming and ranching or that, in the absence of such representations, consumers would have believed the land could be so used. We therefore conclude that disclosures to the effect that the parcels were too

*(footnote continues)*

Finally, we believe respondents' ranching land use representations were misleadingly incomplete. Respondents failed to disclose to prospective purchasers material information needed to correct misimpressions they created about use of the land for ranching. In reviewing the accuracy of respondents' ranching representations we concluded that even one or two head of cattle could not be sustained by grazing on land of the acreage respondents marketed. Respondent claimed that cattle could be raised but did not inform consumers of the additional feed expense that would be required to do so, since the land itself cannot produce sufficient food without irrigation and cultivation. This omission, in our view, rendered respondents' ranching claims misleading.

## E. UNFAIRNESS COUNT

Count III of the complaint alleges that respondents engaged in unfair trade practices by inducing consumers to purchase and continue paying for land of little or no value for the uses represented, through means of collection letters, prepayment discounts, and deceptive representations about the land. Count III further alleges that respondents' receipt and retention of money in these circumstances is unfair. The record establishes (and respondents appear not to dispute) that respondents induced consumers to purchase land and to continue making payments on it through various representations made orally and in writing.[68] We have declared elsewhere in this opinion (Section II.A., C.) that those representations consisted of claims that the land was a good investment and could be used for residential, farming and ranching pursuits, and that those representations were inaccurate and incomplete.

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*(footnote continued)*

small for commercial farming and ranching uses were not needed. However, as we discussed *supra* (Section II.D.4.), respondents' claims that the land was a good investment because it could be used for farming or sold to others for this purpose were misleading since the parcels were so small that hundreds would have to be purchased and joined together to form a farm of minimally feasible size.

[68] There is also some evidence in the record concerning respondents' use of prepayment discounts for these purposes. (CXs 214, 215)

The principal remaining controversy bearing on these allegations centers, then, on the question of the land's value.[69]

The ALJ did not make findings as to the land's actual market value, concluding instead that it had "some" value so that its sale did not fall within Count III of the complaint. (ID p. 115) He acknowledged but did not resolve the conflicting assessments of market value voiced by experts for the parties. These conflicts stem principally from two factors: the experts' views as to the use of the land (upon which the assessment of value depends) and their views as to which other transactions in the area could fairly be compared to respondents' land sales.

Complaint counsel's expert E.T. Compere believed that, when not subdivided, the land's highest and best use was as ranch land, primarily because that was the predominant land use in the five-county area including Culberson County and because the costs of farming, especially irrigation, made that alternative unattractive. (ID 391-94) In comparing the prices at which other land in the area had been sold, Compere excluded sales of other subdivided land because they did not meet his definition of sales for fair market value. This is because such sales, much like the sales at issue in this case, did not involve "normal," market rate financing or face-to-face dealings: because the selling prices varied greatly from the prices for unsubdivided land and appeared to reflect promotional activities rather than market value resulting from arms-length negotiations between fully informed buyers and sellers; and because lack of demand resulted in no resale market for the subdivided properties (indeed, no records of resales from the original purchasers to subsequent purchasers could be located). (ID 396-97) Using instead sales transactions for unsubdivided

[69] The ALJ cited respondents' "liberal refund policy" as part of his rationale for finding no unlawful retention of money. (ID p. 116) The record discloses that respondents' refund policy was in fact quite limited, allowing cancellation only within the first 60 days and after a personal inspection by the purchaser (but not an agent of the purchaser) and with other limitations. (CXs 74-78) Moreover, the record shows very few refunds, some of which were made only after consumers threatened legal action. (Switaj Tr. 1315; Leuckel Tr. 1842; E. Smith Tr. 2095; Limpp Tr. 1420) This evidence persuades us that respondents did not adequately refund the money they received.

land as a comparison, Compere assessed the value of respondents' land at between $35 and $80 per acre in large tracts and between $54 and $110 per acre in small tracts. (ID 400) Other evidence supporting complaint counsel's position that the land has little or no value for the represented uses is the testimony of Martha Conoly that the land is worth between $50 and .$70 an acre and that no resale market exists, the testimony of a local branch bank manager that the land was not acceptable as collateral for a loan, and the testimony of numerous consumers who were unable to resell their parcels. (ID 254, p. 98 n.67)

Respondents' principal expert witness, Larry Brooks, also looked at comparable properties in the area to determine the fair market value of the land at SWS, GVA, and GVA II. However, he was willing to and did rely on evidence of sales at other subdivisions, including U.S. Properties and Terlingua Ranch. In an effort to ensure that these subdivision sales in fact reflected market value, Brooks surveyed consumers by telephone and with a written form mailed to customers. (RX 78-81) He also inspected the properties to ensure comparability. Brooks then determined the land's value was between $275 and $525 per acre. (ID 413-29)

Having carefully reviewed the competing assessments of value, we accept the conclusions of Mr. Compere as to the fair market value of the land respondents sold and we reject the assessment of Mr. Brooks.[70] Respondents' attacks on Compere's testimony are not, in our view, persuasive.

They argue first that Compere's conclusions as to the highest and best use of the land are internally inconsistent, since he testified that ranching is the highest and best use and that the minimum acreage for a ranch is 6,400 acres. Respondents

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[70] There are admittedly deficiencies in the methodologies and assessments made by both Compere and Brooks. However, Compere's conclusions are supported by Martha Conoly's testimony as to the land's marketability and value. *See* Section II.B.1, *supra*. In addition, Compere's valuations are consistent with the fact that there is no resale market for this land at the prices consumers paid, and his conclusions resolve in a more satisfactory and credible fashion the severe discrepancies that he found in prices paid for various similarly-sized parcels. Brooks' testimony does not, in our view, satisfactorily address these other points.

assert that, because their property was sold in five to forty-acre parcels, ranching cannot be its highest and best use. (RAB 47-48) Of course, that is in a sense precisely Compere's point: respondents subdivided the land so that it had little value for ranching because the parcels were too small.[71] What respondents' argument ignores is that the highest and best use as Compere used the term focused on the nature of the land itself (such as its physical characteristics, location, and costs of development, as evidenced by the prior use of the land for ranching), the predominant use of land in that area for ranching, and the low level and unproved productivity of farming in the area. (Compere Tr. 3241-47) Respondents' expert witness agreed with Compere's assessment that the land once subdivided into small parcels was not best used for ranching. (Brooks Tr. 4454) Whether the land has value for other uses, and at what price, are issues that the expert appraisers were thus forced to make in the context of the small acreage parcels respondents sold.

Respondents next challenge Compere's conclusion that small parcels have more value per acre than large ones since this allegedly cannot be reconciled with the conclusion that ranching is the land's preferred use when the land consists of large acreage tracts. (RAB 48) Here respondents misperceive Compere's analysis, for he did not value the small acre parcels of land sold by respondents as ranch land;[72] instead he compared the land to other small parcel transactions in the area to assess its value relative to comparable parcels, most if not all of which were sold for purposes other than ranching. Witnesses

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[71] As complaint counsel note, the problem of "fractionalization" can reduce the usefulness of land for its best uses. (CCAB 39 & n.21; *Horizon Corp.*, 97 F.T.C. 464, 840 (1981)).

[72] Indeed, Compere specifically rejected use of parcels five to forty acres in size as ranch land because he found no other similar tracts in the area being used for that purpose. (Compere Tr. 3246) He further stated that he would not have valued the land in those parcel sizes at all except that FTC staff asked him to do so. (Compere Tr. 3276) Similarly, respondents' expert testified that the best use of that land in small acreage parcels was for rural recreation purposes, not for residential, farming or ranching purposes as respondents had represented, since Brooks found those to be less valuable and less feasible uses of the land. (Brooks Tr. 4328-29; 4450-56)

for complaint counsel and respondents both concluded that parcels sold in smaller acreage tracts have a higher per acre value. (ID 400, 429) This is because, as Compere explained, purchasers would be willing to buy one or two tracts at a per acre price higher than they would be willing to pay for large parcels.

Finally, respondents attack the allegedly arbitrary and selective way in which property sales at other subdivisions were excluded from Compere's assessment of the market value of land sold in small acreage parcels.[73] (RAB 49-50) We believe Compere's exclusion of sales data from subdivisions whose sales prices appeared not to reflect the fair market value of the property was proper. As experts for both parties testified, fair market value means what a willing buyer would pay a willing seller, both parties acting with full information and neither party acting under coercion or duress, and with ample time to complete the sale. (Compere Tr. 3182; Brooks Tr. 4324-25) Sales that do not involve full disclosure of information or that involve misrepresentations about the land simply have no relationship to fair market value and cannot be used as comparables, as respondents' expert agreed. (Brooks Tr. 4489, 4493)

Compere's testimony demonstrates that the sales he excluded bore indications that they were not market transactions at fair market value. The sales he excluded were sales at subdivisions where the land was sold through "promotional" means rather than in face-to-face or person-to-person negotiations, and to absentee purchasers. (Compere Tr. 3241-42, 3259, 3394) The marked variations in per acre prices and the higher prices he found for these subdivision sales,[74] which greatly exceeded prices for land not sold on this basis, confirmed his view that the sales prices of those parcels did not

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[73] In a companion argument, respondents attack Compere's reliance on the Texas Veteran's Land Board sales. (RAB 49-50) We do not find these challenges persuasive.

[74] Compere testified that the per acre prices ranged from $139 to $957 for most of the transactions he reviewed, while the mean sales price was $547. (Compere Tr. 3257-58)

reflect fair market value assessments. (Compere Tr. 3188, 3257)

Compere also found that these subdivision sales were consummated with unusual selling terms such as low downpayments, promotional costs comprising a large proportion of the downpayment, large amounts of the selling price carried back by the seller, and below market interest rates. (Compere Tr. 3188, 3259, 3387-88, 3394, 3397-98) These financial concessions indicate that the selling prices probably exceeded fair market value and, again, that promotional activities rather than market forces were responsible for pricing the land. Finally, Compere pointed to the lack of a resale market for subdivision properties as indicating that the selling prices did not represent fair market value. The lack of a resale market was evidenced by his inability to find any deeds recording person-to-person resales of subdivision property (other than respondents' land, with respect to which four deeds were found) and by the universal refusal of realtors in the area to list such property for sale. (Compere Tr. 3259-62, 3398-99) These are all convincing rationales for refusing to consider these subdivision sales as evidence of the fair market value of respondents' property.

Respondents' expert appraiser took an approach almost exactly opposite to Compere's: he excluded sales of all property except those at two subdivisions that he deemed comparable to SWS, GVA, and GVA II. Although he attempted to determine that prices of the parcels sold in the two comparable subdivisions represented fair market value, the surveys he used turned up evidence of investment sale representations at one of the subdivisions, and Brooks admitted he was not aware of the sales techniques used there.[75] With respect to the other "com-

[75] There is some indication that the sales techniques used at that development, U.S. Properties, included misrepresentations. The principal sales representative there, Mr. Bray, had been involved in land sales at Southwest Land Corporation (the prior owner of SWS land), at SWS and at Horizon. (Bray Tr. 3768-70, 3829) Materials he used in other land sales activities include a number of investment-related claims. (CXs 477, 556) At the least Brooks should have investigated further to determine whether misrepresentations were made at U.S. Properties rather than accepting Bray's denial at face value.

*(footnote continues)*

parable" subdivision Brooks used, he admitted there were a number of significant differences between it and respondents' properties, including that it had an area (perhaps 40,000 acres) set aside for hunting,[76] a swimming pool and clubhouse, a cafe/restaurant, a lodge, and a landing strip, and that it was close to a national park. (Brooks Tr. 4434-35) All of these amenities could increase the value of that subdivision, making it quite dissimilar to the undeveloped property respondents sold.

Another difficulty with Brooks' approach is his determination of the land's highest and best use, which he testified was "rural recreation." [77] (Brooks Tr. 4328) He defined highest and best use as the use that "will generate the greatest net value to the land." (Brooks Tr. 4452-53) Because he found that the land, once subdivided into small tracts, sold for amounts higher

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*(footnote continued)*

We are also troubled by other aspects of Brooks' surveys. First, the low level of responses—some 30 percent of the persons contacted which was only 25 to 30 persons at U.S. Properties (ID 417-20)—makes it difficult to conclude what promotional and selling practices were generally used at these subdivisions. Second, the survey questions posed and the nature of the answers likely to result therefrom do not shed much light on the issue whether misrepresentations were made. For example, none of the surveys asked consumers what representations were made to them about the property or what sales personnel told them. The question closest to this inquired only about the purposes consumers had in buying their land, and Brooks conceded that some consumers listed "investment" in response to this question. (Brooks Tr. 4475) Brooks did not tabulate the consumer responses but complaint counsel's witness, Dr. Michael Mazis, did. (CX 572A, B) To the extent these responses reveal anything, they indicate that many consumers purchased their land for investment-related purposes. Finally, Dr. Mazis identified other significant flaws and biases in the methodology used to conduct the surveys. (Mazis Tr. 4663-78)

[76] Brooks testified that hunting was a rural recreational use for which respondents' land was suited, but he admitted that most hunting on parcels of the size respondents sold would involve trespassing onto other people's property. (Brooks Tr. 4433-34)

[77] We find it revealing that respondents neither marketed the land for these purposes nor argue now that such potential uses give it value. Mr. Brooks' discussion of the highest and best use of the land, in which he considered and rejected farming and grazing activities as the highest and best use, also undercuts respondents' arguments that the land is suitable and valuable for those uses. (Brooks Tr. 4451-55)

than the large tracts used for farming and ranching operations, he concluded that those sales represented the land's highest and best use,[78] (Brooks Tr. 4452-54)

We find Brooks' analysis unacceptably circular to the extent it suggests that a seller may, simply by subdividing land and generating a few sales through questionable tactics, transform the land's highest and best use and substantially elevate its value, without regard to the market's acceptance of the transformations the seller purports to have wrought. Such an analysis ignores the central questions governing the assessment of highest and best use, such as what uses the land is physically suited for, how it can be most productive, and whether there is a market for the proposed uses. Moreover, there is much evidence in the record here to suggest that there is little demand and virtually no resale market for subdivided land like respondents', except in the context of promotional sales involving misrepresentations to uninformed, absentee purchasers. We therefore cannot accept respondents' arguments that rural recreation is the highest and best use for these properties.

Finally, Brooks' assessment of the value of the land respondents sold does not explain two critical factors: the absence of a resale market and the wide disparity in prices paid for land sold through promotional efforts at subdivisions and by contrast for land sold directly in isolated transactions. These two factors cast substantial doubt on the validity of his valuations since land sold for prices at or near its fair market value would, almost by definition, have a resale market and since one would not ordinarily expect the prices for sales of similar property to vary substantially. For all of these reasons, we find his conclusions about the land's fair market value unreliable.

Having concluded that the per acre value of respondents' land when sold in small acreage parcels ranged from $54 to

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[78] Both parties agree that land in small parcels may command a higher per acre price than land in large tracts. This is because buyers are willing to pay more per acre when they are paying less in total, and because sellers are often willing to pass along to buyers cost savings associated with large acre sales. However, this phenomenon does not establish what the land's highest and best use is, or what its market value is, but only that there may be some differential in per acre prices between large and small tracts.

$110 per acre, depending on time and location, (ID 400) we now must consider whether those amounts represent "little or no value" as charged. The ALJ concluded that the properties were "of value" and found no violation of law under Count III (ID pp. 115-16), a conclusion respondents embrace with enthusiasm. (RAB 47) However, we view the question of value as a relative matter. Clearly the land has some value, at least $54 per acre according to complaint counsel's expert. But this amount must be compared to the prices consumers paid, which were of a much higher magnitude, ranging from $600 to $1,200 per acre or perhaps ten to twenty times the land's fair market value. The question of value must also be answered in light of the complaint allegation that the land has little or no value "as an investment, homesite, farm" or for any other use represented by respondents.

We conclude that respondents' land has little or no value as an investment since it was sold to consumers at prices many times its fair market value. Property for which consumers paid between $600 and $1,200 per acre, but which can likely be resold for only $54 to $110 per acre, does not in our view meet any sensible definition of investment value and indeed has almost no value for investment purposes. We also conclude that respondents' land has little or no value for the other purposes respondents represented: use as a homesite, farm or ranch. The land's high cost relative to its market value, the steep development costs needed to prepare the land for these uses, and the risks and limitations that attend consumers' use of the land for these purposes all support our conclusion that the land has little value for these uses. Thus, we find that respondents engaged in the practices alleged in Count III of the complaint when they induced and retained payments on land of little or no value for the uses represented by employing inaccurate and incomplete representations about the land.

## III. LEGAL DISCUSSION

### A. Respondents' Liability for Deceptive Practices

We have considered respondents' conduct in light of the elements of deception set forth in Commission and judicial

opinions, including the Commission's decisions in *Cliffdale Associates, Inc.*, Docket No. 9156 (F.T.C. Mar. 23, 1984) and *Thompson Medical Co., Inc.*, Docket No. 9149 (F.T.C. Nov. 23, 1984). The Commission stated in *Cliffdale* that an act or practice is deceptive if it consists of a representation, omission or practice that is both material and likely to mislead consumers acting reasonably under the circumstances.[79] We conclude that the practices respondents pursued here in the course of marketing and selling land to consumers were deceptive under this standard and violated Section 5 of the FTC Act.

As we have described in the preceding sections, respondents in this matter made a number of representations about the investment value and potential uses for the land they sold at SWS, GVA, and GVA II that were inaccurate and incomplete. Many of the representations were express, as we have noted, and their meanings clear. We can therefore infer that consumers acting reasonably in the circumstances would have interpreted them precisely as they were made. Other representations were implied and required the Commission to determine how consumers reasonably would have interpreted them.[80] We did so by considering the net impression respondents' claims made on consumers, giving due regard to the

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[79] Commissioners Bailey and Pertschuk dissented from the use of this standard, arguing that an act or practice is deceptive under Section 5 of the FTC Act if it has the tendency or capacity to mislead a substantial number of consumers in a material way. *See Cliffdale Associates, Inc., supra* (Pertschuk, Commissioner, concurring in part and dissenting in part); *id.* (Bailey, Commissioner, concurring in part and dissenting in part). Commissioner Bailey believes that respondents' practices here were deceptive and violated Section 5 of the FTC Act because they tended to mislead a substantial number of consumers in a material way by presenting respondents' land, inaccurately, as attractive, money-making investment property that was suitable for a wide range of uses and that did not have any significant drawbacks or limitations. She also agrees that these practices were likely to mislead consumers acting reasonably under the circumstances in a material way, though she does not endorse the use of this standard.

[80] It is important to remember that this evaluation does not focus on whether it was reasonable for consumers to believe or act on the representations at issue. It focuses instead on whether consumers could reasonably interpret the advertising or statements to convey the implied representations.

influence various express statements had on consumers' interpretations of implied claims, and noting the extrinsic evidence in the record in the form of consumers' testimony as to how they interpreted claims made to them. We also determined that respondents omitted to disclose important facts to consumers. Finally, we determined that respondents' practices were misleading because their representations about the land were inaccurate and because they failed to disclose qualifying information needed to correct misimpressions their actions created. We discuss below the specific complaint allegations of deception.

**1. Count I**

We find that respondents represented that the land at SWS, GVA, and GVA II was a good, profitable, safe, and easily resold investment with little or no risk of loss. These representations were made both expressly and by implication.

Respondents expressly represented that purchasers of their land would realize profits within a short time frame, could expect to double or triple their money, and would not suffer any losses on their purchases. The impact of these representations was strengthened by respondents' representations that land in general was a good investment and a good way to make money, particularly because the latter representations were positioned in respondents' brochures and sales presentations in conjunction with extensive pictorial and verbal depictions of respondents' land. Because these representations were express and were in many instances accompanied by explicit factual assurances, consumers reasonably would have interpreted them as they were made.

Respondents also made two types of implied representations. First, respondents represented that oil exploration in the area was under way, that oil companies were moving into the area and might repurchase respondents' land from respondents' buyers, and that increasing oil exploration in the area would lead to the construction of an oil refinery and demand for land for worker housing. Prospective buyers reasonably could have interpreted these statements to represent that respondents' land

was a good investment because of the presence of oil and oil-related development. Second, respondents represented that a nuclear power plant and a guayule processing plant (for producing rubber) might be constructed in the area. Because these representations were made in conjunction with written and oral representations as to the value of respondents' land, prospective purchasers could reasonably have interpreted them to convey the representation that respondents' land was a good investment because of the presence or prospect of commercial and industrial development. In summary, respondents impliedly represented that the presence or prospect of oil and oil-related development and other commercial and industrial undertakings made respondents' land a good investment.

Respondents also failed to disclose to consumers the substantial risks associated with purchasing their land and the difficulty consumers might have attempting to resell it. In light of the affirmative statements respondents made, the absence of these qualifying disclosures could have led reasonable consumers to have misimpressions about the risks of purchasing the land. Respondents' failure to disclose appropriate qualifying information therefore constitutes an omission.

We believe the representations and omissions described above were material to consumers. A material representation or practice is one that is likely to affect a consumer's choice of or conduct regarding a product or service. *See FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 386-87 (1965); *American Home Products Corp.*, 98 F.T.C. 136, 368 (1981), *aff'd as modified*, 695 F.2d 681 (3d Cir. 1982); *Statement of Basis and Purpose for the Cigarette Rule*, 29 Fed. Reg. 8325, 8351 (July 2, 1964). The Commission infers that all express representations are material. *See Thompson Medical Co., Inc.*, Docket No. 9149, slip op. at 59 (F.T.C. Nov. 23, 1984). We also infer that implied representations and omissions are material when they pertain to the central characteristics of the products or services being marketed, such as their performance, quality, cost, or purpose. *Id.* at 60.

As we noted above, a number of the representations respondents made about the investment value of their land

were express, and we therefore conclude those representations were material. In addition, respondents' investment representations—both express and implied—addressed the performance, quality, cost, and purpose of the property in question and are therefore material. The information respondents omitted to disclose to correct consumer misimpressions they created about the risks of investment and resale is also material because it relates to the central characteristics of the transaction about which we would expect consumers to be concerned. We therefore conclude that respondents' misrepresentations of the investment value of their land and their failures to disclose the substantial risks of investing in the property were material.

As we described *supra,* respondents' investment representations were inaccurate. The record demonstrates that the land respondents sold is not a good, low-risk investment and does not have the attractive investment characteristics of profitability, fast appreciation, ease of resale, low risk, and safety that respondents represented. The prices respondents charged for their land were far greater than its market value, making losses likely and profits highly unlikely, and there was virtually no resale market for the land. Further, no oil or gas drilling has occurred and no wells have been sunk within miles of the property, and the land is not known to have commercial amounts of oil and gas. Finally, as we have indicated, the construction of a nuclear power plant or guayule processing plant were highly speculative events.

Because respondents' investment, oil, and development representations were inaccurate, we conclude that they were likely to mislead consumers. It is axiomatic that inaccurate representations about the investment value of land can mislead consumers. Respondents described the land as a solid, virtually risk-free investment, thus presenting the purchase opportunity as an attractive, money-making proposition with few if any drawbacks. Since in fact it was not, consumers' reasonable expectations about the land's investment value were not met, and they were therefore likely to have been misled. Moreover, the record shows that consumers actually were misled by respondents' misrepresentations. We therefore conclude that

respondents' investment representations were deceptive in violation of Section 5.

Respondents' omissions of information as to the riskiness of the land as investment property were likewise deceptive acts or practices, because respondents failed to disclose qualifying information needed to correct consumer misimpressions they created. Respondents did not disclose the uncertainty of the future value of the lots or the probable inability of purchasers to resell the lots at or above their purchase price. Consumers would not reasonably have anticipated these risks because respondents expressly promised otherwise. Disclosure of these risks was material to purchasers both because of the contrary representations made to them and because the information relates directly and significantly to a primary reason for purchasing the land: its purported investment value. We therefore hold that respondents engaged in deceptive practices within the meaning of Section 5 by failing to disclose the land's riskiness as an investment.

**2. Count II**

We also find that respondents represented to consumers that the land they offered for sale was suitable for homesites, farming, ranching, and related uses. Like respondents' investment representations, these representations were made both expressly and impliedly.

Respondents expressly represented that the parcels they sold could be used for homesites and were suitable for elaborate residential uses. Respondents also made express statements that the land could profitably be farmed and would grow sufficient produce for personal consumption, to provide financial independence, and to support at least subsistence level living. Finally, respondents expressly represented that one or two head of cattle for personal consumption could be raised on the land. These representations were made orally and in writing in convincing, graphic terms, and consumers reasonably could have interpreted them as they were made.

In addition, respondents made a number of implied representations. First, respondents described their land in their advertising and promotional brochures as suitable for farming

or orchards, as well as for personal gardening, and referred to farming as a major industry in the area. Consumers could reasonably have concluded from these assertions that the farming-related utility of respondents' land made it a good investment. Second, prospective buyers could reasonably have interpreted respondents' express representations that their land could be used to raise cattle for personal consumption to represent that their land was consequently a good investment since these ranching claims were made in conjunction with express investment representations. We therefore conclude that respondents impliedly represented that their land was a good investment because of its utility for farming and ranching purposes.

Though respondents made numerous representations about potential uses of the land, they failed to disclose the substantial risks and costs associated with these uses. In the absence of qualifying disclosures, and in light of their affirmative representations, respondents' silence on these points could have caused reasonable consumers to believe that these considerations did not pose substantial impediments to their use of the land. Respondents' failure to provide adequate information to correct these misimpressions therefore constitutes an omission.

The land use representations respondents made were material, as was the information they failed to disclose about impediments to use of the land. As we noted *supra*, a material act or practice is one that is likely to affect a consumer's choice of or conduct regarding a product or service. Representations pertaining to the cost or purpose of a product, whether express or implied, and omissions of information needed to correct consumer misimpressions about these matters, are matters of significant concern to consumers and are therefore material.

We have described at length how respondents represented to potential buyers that the parcels they sold could be used: as homesites; as farms capable of supplying sufficient produce to meet personal needs and to sell for at least subsistence level living; and as property capable of supporting one or two head of cattle raised for personal consumption. Similarly, we have detailed the failure of respondents to disclose important information about the costs of utilities and other amenities and

about the substantial risks and costs in using the land as represented. Because these representations and omissions pertain directly to the purposes for which respondents' land could be used and to the costs of those uses, we conclude that they were material.

The land use representations respondents made were inaccurate, largely because of the expense of obtaining water, electricity, and other utility services and because of other limitations inherent in the land. For example, though water may be available, it is available only at great cost. The same is true for other utilities needed if the land is to be used in the ways respondents advertised. Other characteristics of the land also make it unsuitable for the advertised uses. Farming designed to sustain even a subsistence level of living is only possible with irrigation and even then is a risky endeavor made even less attractive by the absence of a local market for any produce grown. Moreover, the typical acreage sold by respondents cannot independently support livestock, so that ranching is only possible for those buyers who install supplemental feed lots.

Respondents' land use claims and the related omissions of fact were likely to mislead reasonable consumers. This is because respondents' representations described the land in an inaccurate and incomplete fashion that concealed significant costs and limitations on use that consumers who purchased the land would encounter in attempting to act on the basis of the representations that were made. In fact, the land cannot perform as promised and consumers cannot undertake the represented uses without major expenses or limitations. Consumers' reasonable expectations about the land were therefore not fulfilled, and they were likely to have been misled. Similarly, respondents' failure to disclose material information about the costs and limitations of various uses for the land was likely to mislead consumers who had contrary beliefs created by respondents' practices. We therefore find respondents' misrepresentations about potential uses of the land and their failures to disclose material information bearing on those advertised uses to be deceptive acts or practices in violation of Section 5.

## B. RESPONDENTS' LIABILITY FOR UNFAIR PRACTICES

Count III of the complaint alleges that respondents committed unfair practices in violation of Section 5 by inducing the purchase of land that had little or no value for the represented uses through deceptive representations, and by receiving and retaining the proceeds of those purchases.[81] The Commission has previously set out the elements of unfairness used to determine whether an act or practice is unfair.[82] Those elements are, in brief, substantial injury to consumers that cannot reasonably be avoided and that is not outweighed by any counterveiling benefits to consumers or competition.

The first portion of Count III, which challenges respondents' conduct inducing the purchase of land that has little or no value for the represented uses, focuses on the role of deceptive representations in making sales at inflated prices.[83] Misleading representations of this sort can certainly be deceptive, and therefore unlawful. Since deception is a means of harming consumer choice, moreover, such representations are unfair as well. Stated this way, however, this portion of Count III does no more than repeat the essence of Counts I and II, in which we have already found the respondents' sales practices to be deceptive and therefore unfair. There is no need to revisit those conclusions.

The second portion of Count III alleges that it is unfair to receive and retain the proceeds of purchases induced by means of deceptive representations. This allegation does state a

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[81] Counts I and II of the complaint alleged that respondents' practices were unfair as well as deceptive. Since we have found the practices deceptive, it follows that they were also unfair; the misrepresentations and omissions of fact respondents practiced caused substantial injury to consumers that could not reasonably have been avoided and that was not outweighed by any countervailing benefits.

[82] *See* Letter from Federal Trade Commission to Honorable Wendell H. Ford and Honorable John C. Danforth (December 17, 1980).

[83] The complaint does not charge, and we do not hold, that it is illegal to charge too high a price for a commodity, or that it is unfair for consumers to agree to too bad a bargain. Such a theory probably could not be sustained under the Commission's unfairness standards in the absence of additional factors rendering the transaction unfair.

separately cognizable cause of action that has not already been addressed as a deceptive practice. We conclude that inducing consumers through misrepresentations to make payments on land they have purchased, as respondents did, constitutes an unfair trade practice under the criteria outlined above. Our conclusion that this is so arises principally from the pervasive and continuing exposure of consumers to misrepresentations about the land, which we described in Section II, *supra*. The Commission has reached similar conclusions in other cases where a respondent's receipt and retention of money through misrepresentations and other illegal means were ruled unfair. *See Holiday Magic, Inc.*, 84 F.T.C. 748, 1045-46 (1974); *Universal Credit Acceptance Corp.*, 82 F.T.C. 570, 647-48 (1973), *rev'd in part sub nom. Heater v. FTC*, 503 F.2d 321 (9th Cir. 1974); *Curtis Publishing Co.*, 78 F.T.C. 1472, 1516 (1971) (dictum).[84]

Respondents' practices resulted in substantial monetary injury to consumers, because they induced consumers to continue paying substantial amounts for land under their purchase agreements—despite the low value of the properties they had purchased—through a variety of continuing misrepresentations. Thus, those consumers suffered monetary losses they might otherwise have limited by terminating payments, seeking to rescind their contracts, or attempting to resell their land. In short, consumers who purchased land from respondents paid substantial sums of money to respondents but did not receive the benefit of their bargains, either as an investment or as a function of the uses to which the land could be put. Their failure to receive the value or functions they paid for injured them substantially.

Consumers could not reasonably have avoided this injury, because respondents' practices hindered the free exercise of informed consumer decision-making. In particular, respondents' repeated post-purchase misrepresentations about the

[84] Though the unfairness of such conduct is well-established, our ability to order restitution of monies already collected has been constrained by the decision in *Heater v. FTC*, 503 F.2d 321 (9th Cir. 1974), and we decline to order restitution to redress past consumer injury in this case. *See* Section IV, *infra*.

land inaccurately and incompletely portrayed its value and suitability for various uses. Consumers who continued to make payments on their parcels could not reasonably have avoided the injury they suffered, because respondents' continuing assurances and misrepresentations made it difficult for consumers to learn of the relative worthlessness and unsuitability of their land. Respondents' reliance on their refund policy as a means by which consumers could have avoided injury (RAB 56) is misplaced. Respondents' practices probably induced many consumers to decline to seek refunds and, in any event, the refund policy was quite restrictive.

Finally, we find no countervailing benefits to consumers or to competition from respondents' practice of receiving and retaining through misrepresentations payments for land of little or no value. There can be no benefit to society from the dissemination of misrepresentations that induce consumers to continue making payments that they might very well have terminated if they had not been misinformed. *Cf. Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771-72 (1976); *Sears, Roebuck & Co. v. FTC*, 676 F.2d 385, 399 (9th Cir. 1982). Receiving and retaining money on that basis distorts the free and fully-informed exercise of consumer choice and offers no countervailing benefits to society; it simply enriches wrongdoers.[85]

Because respondents' conduct satisfies all three elements of the Commission's unfairness definition, we conclude that respondents' receipt and retention of funds whose payment was induced by post-purchase misrepresentations constitutes an unfair act or practice in violation of Section 5.

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[85] Respondents argue that no unlawful retention of funds occurred here because the money respondents obtained from consumers was "lawfully expended for reasons other than avoidance of a restitution order," citing *Holiday Magic, Inc.*, 84 F.T.C. 748, 1048 (1974). (RAB 56-57) We believe respondents have misconstrued that opinion as we find nothing in it suggesting that no unfair retention of money occurs so long as deceptively obtained funds are spent. Rather, the Commission simply noted in the discussion of remedial provisions ordered that expenditures of money by respondents made those funds unavailable for return to consumers under a restitution program.

## C. RESPONDENTS' LIABILITY FOR AGENTS' ACTS

An important legal issue in this case, treated only briefly by the ALJ, is whether respondents are liable under Section 5 for the actions of their broker, Porter Realty. The evidence indicates overwhelmingly that Porter Realty sales personnel misrepresented various aspects of the properties they sold for respondents during the period of their relationship, particularly the investment value of the land and the extent and significance of nearby oil and gas activity. The ALJ concluded that respondents were not liable for these misrepresentations because "there must come a point where a respondent is permitted to exculpate himself." (ID pp. 113-14) While we agree that that is a correct statement of the law, we disagree that that point was reached here. We hold instead that respondents violated Section 5 through the actions of their agents, Porter Realty and the other brokers who acted with actual and apparent authority on respondents' behalf.

A respondent may be liable for deceptive acts or practices committed by another in at least two circumstances: when the other person has respondent's actual authority to perform the acts, and when the other person performs acts within the scope of his or her apparent authority.[86] We discuss each of these theories in turn.[87]

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[86] Respondents also may be liable under the "placing in the hands" doctrine for misrepresentations made to prospective purchasers in printed materials Porter Realty received from respondents and supplied to consumers. Under this doctrine, "[o]ne who places in the hands of another a means of consummating a fraud or competing unfairly in violation of the . . . Act is himself guilty of a violation of the Act." *Regina Corp. v. FTC*, 322 F.2d 765, 768 (3d Cir. 1963). *See also FTC v. Winsted Hosiery Co.*, 258 U.S. 483, 494 (1922).

[87] Though respondents analyze the requirements of agency law developed under the common law, we rely instead on Commission case law and precedent. We believe respondents' brokers would be seen to act with actual and apparent authority under common law principles as well, but we need not reach that issue. As the Commission commented in *Atlas Aluminum Co.*:

> Whatever the legal relationship between respondents and their salesmen might have been under the law of contracts or the law of agency, it is well established in trade regulation law that

*(footnote continues)*

**1. Actual Authority**

That respondents are responsible for acts, including misrepresentations, they have expressly or implicitly authorized others to perform for them can hardly be questioned. *See Restatement (Second) of Agency* § 257; W. Sell, *Agency* § 102 (1975). Those authorized to act or who reasonably believe they are authorized to act on behalf of respondents are agents of respondents whose every act (within the scope of the agency relationship) is equivalent to an act performed by the respondents.

In this case, respondents gave Porter Realty actual authority to make both oral and written representations with respondents' approval. The Agents Agreement under which Porter Realty represented respondents contained two provisions in this respect: one clause allowing use of advertising, promotional material and sales presentations with respondents' written approval, and a second clause prohibiting representations about the properties except for those authorized by respondents. (CX 37) The record establishes that respondents did authorize Porter Realty to use a variety of promotional materials and to make numerous representations about the land. For example, respondents supplied Porter Realty with brochures, fact sheets, contracts and other sales materials containing statements about the investment potential of the property and the existence of nearby oil exploration and development. Respondents told Porter that representations could be made based on anything in those sales materials.[88] (Porter Tr. 2370) Respondents also authorized Porter Realty to pass on to prospective buyers written materials respondents supplied that were intended to be

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*(footnote continued)*

> respondents are responsible under the Federal Trade Commission Act for the representations of their sales representatives.

71 F.T.C. 762, 787 (1967). *See also Goodman v. FTC*, 244 F.2d 584, 590 (9th Cir. 1957); *Grolier, Inc.*, 91 F.T.C. 315, 459 (1978) ("The Commission is not bound by the common law rules governing vicarious liability or agency."); *Weavers Guild*, 52 F.T.C. 982, 987, 994 (1956), *aff'd sub nom. Goodman v. FTC, supra.*

[88] Porter Realty's employees used these materials as the basis for telephone scripts used in promoting the land to consumers. (Porter Tr. 2294-95)

used as sales tools and that described the property in question, its investment value, and its potential use. (Porter Tr. 2270-77, 2285, 2291; Kritzler Tr. 4107) And respondents orally approved materials prepared by Porter Realty for use in marketing.[89]

The parties hotly debate whether Porter Realty's use of the "oil map" was authorized by respondents: Porter says it was, Kritzler says it was not.[90] It is clear respondents were aware of their agents' use of the map over some period of time. (Kritzler Tr. 4124-25) Moreover, respondents maintained a very close relationship with Porter Realty, and Kritzler and Porter spoke with each other on the telephone daily to discuss sales and sales strategy. (Porter Tr. 2302) During that time Porter Realty continued to use the oil map, perhaps for as long as one year. It also appears that respondents' own brochures and fact sheets contain references to oil and the oil industry in the area. In light of this evidence, we give little credence to Kritzler's declaration that he did not know of or authorize use of the oil map.

Even if respondents did not explicitly authorize use of the oil map, however, respondents' actions constituted implicit authorization. As we noted in *Horizon Corp.* in our discussion of short term profitability claims made by Horizon's agents:

> It is difficult to believe that Horizon management did not searchingly inquire as to the marketability of its product and the manner in which its agents represented that product. . . . However, even if Horizon management chose to remain ignorant of the time

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[89] According to Porter, materials that were not prepared directly by respondents were approved by Kritzler: "Almost every time I used something new, I would send them a copy. I would speak with Kritzler every day about the sales, how to help sales, and I would mention that—I was going to use a new brochure, and he would always say send me a copy." (Porter Tr. 2301) Kritzler testified that he did not approve use of all materials, notably the oil map (Kritzler Tr. (4124-25), while Porter testified that Kritzler approved of the use of nearly all materials including the maps, but said that Kritzler warned against their misuse. (Porter Tr. 2314, 2358) At any rate, it is clear that Porter and Kritzler had a very close working relationship, and were in almost daily contact about sales practices, materials and techniques.

> frame representations made by its sales force, its ignorance constitutes a failure to exercise reasonable diligence in controlling sales practices in the field, and does not serve as a defense to Section 5 liability. . . . Therefore, we conclude that Horizon allowed its agents to make false and misleading statements in marketing its properties.

97 F.T.C. 464, 815 (1981). Respondents here likewise cannot, through a seemingly conscious refusal to acknowledge what they must have known, shield themselves from responsibility for the actions of brokers who sold 80 percent of their land. The record shows, moreover, that respondents did authorize Porter Realty to make investment and oil-related representations to consumers orally and in written materials prepared from respondents' marketing materials, because respondents permitted their brokers to repeat whatever claims appeared in their own promotional materials which, as we noted above, included oil-related statements. Respondents therefore are liable for the deceptive practices Porter Realty and its sales representatives committed in keeping with respondents' authorization.

**2. Apparent Authority**

Respondents also may violate Section 5 when actions of agents vested with apparent authority deceive the public for the benefit of the respondent. *See Beneficial Corp.*, 86 F.T.C. 119, 161 (1975), *aff'd*, 524 F.2d 611 (3d Cir. 1976), *cert. denied*, 430 U.S. 983 (1977); *Horizon Corp.*, 97 F.T.C. 464, 860 (1981). Here the question focuses on the consumer and whether the consumer believes the agent has been empowered by the principal to make the representations in question. Indeed, even where a principal has made efforts to prevent misrepresentations or to limit actions by agents the principal may be held liable under Section 5 if the agents, acting within the scope of their apparent authority as manifested to the consumer, ignored the principal's directives and violated the law. *See Standard Distributors, Inc. v. FTC*, 211 F.2d 7, 13 (2d Cir. 1954). The apparent authority of an agent must be established through proof of the principal's conduct

or representations, and the determination that an agent is apparently authorized to bind the principal is a question of fact. W. Seavey, *Law of Agency* § 16B (1964). These principles have been enunciated in a number of Commission cases.

*Standard Distributors, Inc. v. FTC, supra,* involved a respondent's marketing of encyclopedias through door-to-door sales representatives. Misrepresentations by the sales personnel were in direct violation of the corporation's instructions, but the court upheld the Commission's finding of liability:

> [The salesmen] were nevertheless the authorized agents of the corporate petitioners . . . to sell the books. The misrepresentations they made were at least within the apparent scope of their authority and part of the inducement by which were made sales that inured to the benefit of the corporate petitioner. Unsuccessful efforts by the principal to prevent such misrepresentations by agents will not put the principal beyond the reach of the Federal Trade Commission Act.

211 F.2d at 13. *See also United States v. Johnson,* 541 F.2d 710, 712 (8th Cir. 1976), *cert. denied,* 429 U.S. 1093 (1976) (principal can be held liable for actions of agents acting within scope of apparent authority even if principal attempts to limit agents' actions).

Another case, *Universe Chemicals, Inc.,* 77 F.T.C. 598 (1970), involved an attempt by a principal to shield itself from responsibility for acts of sales personnel by calling them "independent contractors". The ALJ determined that respondents "clothed these salesmen with apparent authority to act for them and ratified the transactions these salesmen initiated. Thus, they are responsible for the representations such salesmen made, even though such salesmen were expressly forbidden to make them." *Id.* at 629. The argument that respondents may avoid liability because they do not actually direct or control their agents' actions is also unavailing:

> In claiming that their inability to direct or control the activities of their representatives insulated them from

> their salesmen's misrepresentations, respondents have apparently misconstrued the applicable legal test, under which, as the examiner correctly found, a seller is held liable for deceptive acts in violation of Section 5 of the Federal Trade Commission Act made by individuals whom the seller has invested with apparent authority to act on its behalf and that it is immaterial that respondents have not directed or controlled these persons.

*Inter-State Builders. Inc.*, 72 F.T.C. 370, 402 (1967).

The Commission has not adopted a theory of *per se* or strict vicarious liability for the actions of a business associate in all cases. *See National Housewares, Inc.*,[90] F.T.C. 512, 588 (1977). In cases of apparent agency, however, a principal's liability follows automatically from the finding that an agent appeared to consumers to be authorized by the principal to act on the principal's behalf.[91] The Commission does not limit

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[90] Porter stated that Kritzler had no objections "to using them, no, he didn't." (Porter Tr. 2314) Porter explained on cross-examination by respondents' counsel that Kritzler said "[i]t's okay to use it, but how are you gonna control it, using it is fine but be very careful we want no mention of anything about oil or anything in or near the properties. And he spoke of this continually." (Porter Tr. 2358) Kritzler stated that he first learned that Porter Realty was using the oil map in "late fall of 1977" and that he did not authorize use of the map. (Kritzler Tr. 4124-25) Further, he testified that on learning of its use he "[c]alled Porter immediately and told him not to use the map, that it was outside of his jurisdiction to do that." (Kritzler Tr. 4125-26) Nothing in the record suggests that use of the oil map was approved in writing as the contract between Porter Realty and respondents seems to require. However it is clear from the parties' failure to reexecute an agreement during the later years of Porter Realty's engagement that the written terms of their contract were not essential to the relationship. In any event, Porter Realty's failure to secure written approval for its activities does not prevent us from finding as a factual matter that respondents did indeed authorize certain representations.

[91] When considering the possible liability of a principal based on the apparent authority the principal has given to an agent, whether challenged representations or misrepresentations were actually authorized or forbidden is irrelevant. W. Sell, *Agency* § 108 Authorization must be considered when determining the *actual* authority of an agent, but *apparent* authority is based on the manifestations of authority by the principal to a third person. Therefore instructions that prohibit the representation, of which the third person does not have notice, do not relieve the principal of liability for the apparent agent's misrepresentations. *Id.*

application of the theory to those instances where respondents have acted in bad faith, without due care, or negligently. Indeed, respondents may be liable for acts they did not authorize that occurred without their knowledge and in spite of diligent preventative efforts. The rationale for this seemingly harsh standard was provided by Judge Learned Hand: [92]

> Since the principal has selected the agent to act in a venture in which the principal is interested, it is fair, as between him and a third person, to impose upon him the risk that the agent may exceed his instructions.

*Standard Distributors, Inc. v. FTC, supra,* 211 F.2d at 15. *See also Royal Globe Ins. Co. v. Bar Consultants, Inc.,* 577 S.W.2d 688, 694 (Tex. 1979) ("lack of authority is not a defense if the agent is acting within the apparent scope of his authority, and not even instructions not to mislead nor diligence in preventing the misrepresentations will exculpate the corporate principal").

Whether an agent has apparent authority to act must be determined by examining manifestations made by the principal to the consumer that the agent is so authorized. In *Atlas Aluminum Co.,* the apparent authority of agents was established by, among other things, their use of contract forms that were imprinted with respondents' name and address and, most importantly, the fact that the:

> salesmen did not purchase respondents' products for resale. They sold respondents' products on behalf of respondents and thus were employees and agents of respondents and not independent contractors and dealers. Whatever limitations there might have been on the actual authority of the salesmen as agents of

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[92] Judge Hand's formulation of the rationale for holding principals liable for the acts of their agents within the scope of their actual or apparent authority is neither a recent nor novel approach:

> [T]he merchant [is] answerable for the deceit of his factor, . . . ; for it is more reason, that he, that puts a trust and confidence in the deceiver, should be a loser, than a stranger.

*Hern v. Nichols,* 1 Salk. 289, 90 Eng. Rep. 1154 (1709), *quoted in* J. Hynes, *Agency and Partnership* 167 (1974).

> respondents (and this was not developed), the fact is that they were acting for and on behalf of respondents and were clothed with at least the apparent authority to make representations and otherwise act in the name of respondents.

71 F.T.C. 762, 787 (1967). In *Wilmington Chemical Corp.*, 69 F.T.C. 828 (1966), principals were found liable for the acts of the "independent contractors" in part because the contractors were provided by the principals with a "sales kit" that contained "advertising literature, samples, and other sales aids." *Id.* at 925.

In *Inter-State Builders,* the Commission found "actual or apparent authority to speak and act for or on behalf" of the principal based on (1) respondents' furnishing the "independent contractors" or "brokers" with printed contract forms bearing the name of the principal; (2) other printed materials with the principal's name, including credit applications; (3) the principal's giving the "brokers" "specific authority to negotiate the terms of and indeed execute the contracts; and (4) the use of the principals' offices by one of the "independent brokers." 72 F.T.C. at 403. As the Commission noted, "[t]he only conclusion which could be reached by a customer is that he is dealing solely with [the principal] and that the salesman who signs the contract on [the principal's] behalf is its authorized representative." *Id.* at 403-04. The Commission quoted with approval the court's assertion in *International Art Co. v. FTC* that "[w]e know of no theory of law by which the company could hold out to the public these salesmen as its representatives, reap the fruits from their acts and doings without incurring such liabilities as attached thereto." 109 F.2d 393, 396 (7th Cir. 1940).

That respondents clothed Porter Realty and their other brokers with apparent authority to make investment and other representations about the land being marketed to consumers is evident. The written materials that the brokers distributed to potential buyers, including brochures, "fact sheets," and purchase agreements, were provided to them by respondents. These materials all had respondents' names, rather than the

brokers' names, printed on them. (CXs 74-78) The purchase agreements used to consummate sales stated plainly that the "seller" was SWS, GVA, or GVA II, not the broker who arranged the transaction. (CXs 175H-I, CXs 74-78) Further, the cover letter sent by Porter Realty with the written materials instructed buyers to send a down payment for the property to the appropriate respondent by a check made out to the respondent. (CXs 126, 175E) These manifestations indicated to consumers that the principals in this transaction were not Porter Realty and its representatives, but were the respondents on whose behalf Porter Realty and the other brokers acted.

The substance of the arrangement between respondents and the brokers confirms this implication. Though respondents describe Porter Realty and the other brokers who marketed the land as "independent sales brokers" they were not in fact independent sellers of the land. The brokers sold land on behalf of respondents and received a 30 percent commission. (CX 37A; Porter Tr. 2258) *See Atlas Aluminum Co.*, 71 F.T.C. 762, 787 (1967). They did not purchase the land from respondents in order to resell it to consumers for a profit. The materials used by the brokers, described above, reflect this arrangement, so that in both the reality and the appearance of a consumer's purchase transaction the broker represented and acted on behalf of respondents. Statements made by brokers in the course of marketing the land were therefore made within the scope of the brokers' apparent authority, and respondents are accordingly liable for those that were deceptive.

Respondents contend that their liability for actions by "independent" brokers depends on a factual showing that has not been made in this case. Specifically, respondents argue that clauses in the GVA and GVA II fact sheets and sales agreements limited Porter Realty's apparent authority by informing consumers that Porter Realty was unauthorized to make certain representations.[93] Because these disclosures warned consumers how far Porter Realty's authority extended, respondents argue,

[93] The SWS fact sheets do not contain clauses purporting to inform consumers of the limits of Porter Realty's authorized representations, though Porter Realty sold SWS properties. (CXs 81, 82)

representations beyond that point, including representations about the land's investment value and potential for oil, could not have the appearance of being authorized. We consider first the fact sheet disclosures and then the contract provisions.

The clause in the GVA and GVA II fact sheet reads:

> It is in the interest of the buyer to inspect and read all contract documents before signing to purchase. The property owners fact sheet is given for the purpose of preventing misunderstanding, misrepresentation, fraud, or deceit.
>
> The developer does not authorize anyone to make or cause to be made to any prospective purchaser any representation contrary to the foregoing or any representation which differs from the statements in this fact sheet or the purchase agreement. If any such representation is made, please notify this office at Green Valley Acres, Inc.

(CX 83) The operative phrases in this "limitation" are "contrary to the foregoing" and "which differs from" the fact sheet or purchase agreement. It is not entirely clear what respondents meant by "the foregoing," since these are the first two paragraphs in the fact sheet. We assume that "the foregoing" refers to the "contract documents," meaning again the fact sheet and the purchase agreement.

We find this clause, vague and general in its phrasing, insufficient to alter the appearance of authority otherwise created in Porter Realty and the other brokers. Moreover, even if the purported limitation were stated more precisely and communicated more efficiently, it would not in this instance serve to warn consumers that investment and oil representations were unauthorized and should not be relied on. This is because the fact sheet and contract referred to in the limiting clause are largely silent on these critical points; they contain no information on the investment potential of the land or the presence there of oil and gas. Yet the fact sheets do mention oil by noting that it is a "Major Industry," presumably of the area if not of the specific GVA or GVA II properties. (CX 84D, 85D)

Investment and oil representations made orally by Porter Realty or the other brokers would therefore not be inconsistent with or contrary to the information in the fact sheet. Those consumers who understood the warning and attempted to apply it to see which oral claims should be disregarded would not, under the circumstances, have identified investment and oil claims.

The provisions in the sales contracts respondents point to as limiting the apparent authority of the brokers are not in fact disclosures of the limitations on their agents' apparent authority but are simple integration clauses. The GVA and GVA II contracts both provide that "[t]here is no understanding or agreement between the parties except as expressly set forth herein, and this Agreement may not be amended except in writing and with the consent of the Seller." (CXs 74-76) Like the fact sheet "warnings," this contractual clause does not change the appearance that Porter Realty and the other brokers had authority to make investment and oil representations and does not have the effect of warning consumers not to rely on brokers' representations about the value of the land and the significance of oil-related activities in the area.[94]

Respondents' remaining arguments—that no liability exists for their agents' acts because respondents did not retain the illegal fruits of their agents' misrepresentations and because they did not know of or acquiesce in their agents' misconduct—are patently without merit. The refund and surveillance programs respondents ran had at most a minimal effect in correcting, after the fact, injury suffered by some purchasers. The programs did not even approach the point of causing respondents to disgorge all illegal fruits of their agents' conduct. And the record is replete with evidence that respondents acquiesced in and even approved numerous representations made by their agents that we have found deceptive. Accordingly, we conclude that respondents violated Section 5 through

[94] The limited capacity of these clauses to warn consumers about unauthorized representations was further diminished by the timing of their delivery to consumers; the clauses appear in respondents' sales contracts, which were mailed to potential buyers *after* investment and oil representations were made to them by the brokers.

the misrepresentations committed by agents whom they vested with actual and apparent authority.

## ORDER

Our findings as to respondents' violations of Section 5 of the FTC Act lead us to conclude that an order must be entered prohibiting respondents from engaging in the same or similar conduct in the future. We have decided to issue the attached Order after considering the record in this case and the arguments made by counsel. We are not persuaded, as respondents urge, that no order is necessary and that the individual respondents that the order sought by complaint counsel should be adopted in the form proposed. Instead, we enter an Order against the corporate and individual respondents in this proceeding that varies substantially from that offered by complaint counsel, but that is broad enough to protect the public against the unfair and deceptive acts and practices identified in this opinion without imposing undue burden. *See Bristol-Myers Co. v. FTC*, 738 F.2d 554, 560-62 (2d Cir. 1984).

### A. RESPONDENTS' ARGUMENTS

Respondents' principal objections to entry of an order in this case are that it is unnecessary for a variety of reasons and that individual liability has not been established. Respondents argue that no order is needed because they terminated their relations with their brokers years ago and ceased all sales by early 1978; because they cannot resume any deceptive practices due to the restrictions of the Interstate Land Sales Full Disclosure Act [ILSFDA,], 15 U.S.C. §§ (1982); because the state of Texas has obtained an Assurance of Voluntary Compliance [AVC] with respondents; and because the individual respondents acted in good faith. We address these arguments below.

#### 1. Need for Entry of an Order

First, respondents' apparent discontinuance of practices violating Section 5 does not, as a practical matter, provide any assurance that such practices will not be reinstated in the same or similar form in the future so that no order is required. While

respondents terminated their relationships with their brokers and may have stopped sales of their land,[95] nothing now prohibits them from resuming their marketing activities, hiring new brokers, or starting again to engage in the same conduct practiced in the past by the brokers and by respondents through their sales representatives. Entry of a formal order guards against the resumption of these practices. Moreover, even if respondents have terminated sales of land, they are still collecting payments on prior sales. (Gross Tr. 297) We found respondents' practice of inducing continued payments on purchases through misrepresentations about the land to be unfair, so that an order provision barring that practice is warranted whether or not new sales are continuing.

With respect to respondents' ILSFDA argument, we note that respondents' duties under that statute are not coextensive with its obligations under the FTC Act. *Cf. Horizon Corp.*, 97 F.T.C. 464, 861-62 (1981). There are, moreover, a number of exemptions from coverage under the ILSFDA of which respondents could avail themselves with a few changes in their operation.[96] Respondents' repeated transgressions of Section 5 also indicate a willingness to violate federal law that we have no reason to believe would not be repeated with respect to the requirements of the ILSFDA. For these reasons, the ILSFDA does not provide sufficient protection against respondents' use of deceptive land sales practices, and a Commission order is needed to ensure that consumers are amply protected.

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[95] Some question remains as to whether and when respondents stopped selling land. *See* note 5, *supra*.

[96] Before 1978 the ILSFDA did not apply to sales in developments in which the smallest lot was five acres or more. 15 U.S.C. § 1702(a)(2) (1976). Respondents were apparently exempt from the ILSFDA under this provision. The minimum acreage exemption was raised to 20 acres in 1978. 15 U.S.C. § 1702(b)(4) (1982), so that under their current sales structure respondents appear to be covered by the ILSFDA. However, respondents could take advantage of the exemptions in the ILSFDA by simply increasing the sizes of parcels offered for sale to 20 acres or more, moving their activities outside of the prophylactic provisions of the ILSFDA. So long as an increase in lot size is effected for reasons other than to avoid ILSFDA, the law exempts such sales from the required registration and disclosure obligations. 15 U.S.C. § 1702(b)(4) (1982).

With respect to the AVC respondents entered into with the Texas Attorney General in December 1978 (CX 207), we find it to be much weaker and more limited than the Order we deem necessary here. The AVC does not cover respondents Gross and Kritzler as individuals, nor does it apply to SWS. It is also narrower than the order we enter since it limits its reach to the specific practices listed. (CX 207B-C) Finally, the AVC is a voluntary device, not enforced by the Commission, and allowing for only limited enforcement by the state of Texas and perhaps only within the confines of that state. A legally enforceable cease and desist order with nationwide reach has much stronger power to regulate respondents' practices than does this voluntary AVC device.

Finally, we reject respondents' argument that no order is needed because the individual respondents acted in good faith. We find sufficient evidence of the individual respondents' personal participation and acquiescence in the activities constituting unfair and deceptive practices that their inadequate attempts to limit, after the fact, the effects of these practices on some consumers do not, taken together, establish their good faith. In any event, we do not accept the proposition that Commission orders need not be imposed on those who violate the law unintentionally or in good faith. *See Chrysler Corp. v. FTC*, 561 F.2d 357, 363 & n.5 (D.C. Cir. 1977) ("an advertiser's good faith does not immunize it from responsibility for its misrepresentations"); *Feil v. FTC*, 285 F.2d 879, 896 (9th Cir. 1960) (existence of good or bad faith not material); *AMREP Corp.*, 102 F.T.C. 1362, 1632 n. 25 (1983), *petition for review filed*, No. 84-1434 (10th Cir., April 2, 1984).

Besides the factual shortcomings in respondents' opposition to the Commission's entry of an order, there are legal principles that sustain our rejection of these arguments as well. First, it is clear that a respondent's discontinuance of violative practices and its termination of agents who violated the law does not relieve it of liability for those past actions. *See Horizon Corp.*, 97 F.T.C. 464, 860 (1981); *Standard Distributors, Inc. v. FTC*, 211 F.2d 7, 13 (2d Cir. 1954). This is especially true where, as here, the Commission may seek consumer redress for respondents' actions in accordance with

the provisions of Section 19(b) of the FTC Act. Because a cease and desist order under Section 5 is a statutory prerequisite for action under Section 19, entry of an order is necessary for these reasons as well.

Commission law also holds that voluntary discontinuance of practices by respondents particularly when that occurs only in the face of an investigation or lawsuit does not exonerate respondents or render the proceeding moot. *See Fedders Corp. v. FTC*, 529 F.2d 1398 (2d Cir.), *cert. denied*, 429 U.S. 818 (1976); *Montgomery Ward & Co. v. FTC*, 379 F.2d 666 (7th Cir. 1967); *Carter Products, Inc. v. FTC*, 323 F.2d 523 (5th Cir. 1963). The District of Columbia Circuit noted, "[a]ppraisal of the danger that deception may recur if not forbidden is initially for the Commission. If that danger is sufficient, there is no bar to enforcement merely because the conduct has ceased at least temporarily under the weight of the Commission's hand." *W.M.R. Watch Case Corp. v. FTC*, 343 F.2d 302 (D.C. Cir.), *cert. denied*, 381 U.S. 936 (1965).[97] We believe the danger of respondents' repetition of these practices exists in this case because respondents still own the land free of any significant legal barriers or limitations on their resumption of sales and marketing activities. For all of these reasons, we conclude that a cease and desist order is necessary.

**2. Liability of Individual Respondents**

We also hold that the order entered should apply to the individual respondents named in the complaint. A cease and desist order may be entered against individuals who participate in the unlawful practices of a corporation or are otherwise responsible for a firm's commission of deceptive acts. For example, an individual is liable for violations of Section 5 if he or she formulates, controls or directs corporate policy. *See Standard Educators, Inc.* v. *FTC*, 475 F.2d 401, 403 (D.C.

[97] Reliance on abandonment as a defense is particularly inappropriate in this proceeding, where respondents dispute most of the material allegations of the complaint and deny that their practices violated Section 5. This places respondents in the position of arguing that they will not engage in certain practices even though they could do so because they believe the practices are legal. *Cf. C. Howard Hunt Pen Co. v. FTC*, 197 F.2d 273, 281 (3d Cir. 1952).

Cir.), *cert. denied,* 414 U.S. 828 (1973); *Tractor Training Service* v. *FTC,* 227 F.2d 420, 425 (9th Cir. 1955), *cert. denied,* 350 U.S. 1005 (1956). If the individual knew or approved of the illegal corporate practices or played a significant role in carrying them out, a cease and desist order may be entered against the individual as well as the company. *Pati-Port, Inc.* v. *FTC,* 313 F.2d 103, 105 (4th Cir. 1963); *Gold Bullion International, Ltd.,* 92 F.T.C. 196, 210-11 (1978). Individual liability is also appropriate when the individual is actually and personally responsible for the violation or where the respondent corporation is little more than an embodiment of the individual. *See Coro, Inc.* v. *FTC,* 338 F.2d 149, 154 (lst Cir. 1964), *cert. denied,* 380 U.S. 954 (1965); *Virginia Mortgage Exchange, Inc.,* 87 F.T.C. 182, 203 (1976); *Peacock Buick, Inc.,* 86 F.T.C. 1532, 1565-66 (1975), *aff'd,* 553 F.2d 97 (4th Cir. 1977) (opinion unpublished).

There is in this case substantial evidence that respondents Kritzler and Gross formulated, directed and controlled the actions of the corporate respondents and participated personally and directly in the unfair and deceptive practices used so that they satisfy the legal requirements for finding individual liability. In many respects, these individuals *are* the respondent corporations. Respondent Gross and his immediate family own all three corporate respondents and serve as officers and directors of them as well.[98] Respondent Kritzler is the general manager of all three corporations, responsible for dayto-day operations, and also serves as an officer of SWS. Gross and Kritzler both are responsible for making corporate policy and, indeed, only these two among all the members of the corporate

[98] *SWS:* The president of SWS in December 1973 was Harold Gross, respondent Sydney Gross' son. Laurie Gross, respondent Sydney Gross' daughter, was secretary-treasurer. (Gross Tr. 301). The directors of SWS in December 1973 were Kritzler, Harold Gross, and Laurie Gross. *GVA:* Sydney Gross is president of GVA, his wife Sara Gross is its vice president, and Harold Gross is secretary-treasurer. The directors of GVA are Harold Gross, Sydney Gross, and Barry Gross, another son of Sydney Gross. *GVA II:* Sidney Gross is president of GVA II, Harold Gross is its secretary-treasurer, and wife Sara Gross is its vice president. The directors of GVA II are Sidney Gross and Harold Gross.

respondents' management were involved in setting policy. (ID 8, Gross Tr. 315) None of the corporations' directors or officers, other than Gross and Kritzler, are or have been involved in the everyday operations of SWS, GVA, and GVA II. (Gross Tr. 304)

The manner in which Gross and Kritzler exercised their managerial and policy-making responsibilities demonstrates the extent to which they were personally involved in practices violating Section 5. As the ALJ found, Gross and Kritzler selected the properties purchased and the prices to be charged. They also decided upon the promotional materials, commercials and contract forms used. (ID 9) In this respect, they were directly responsible for the preparation of promotional brochures (CXs 8789) sent to potential purchasers containing express and implied representations that the properties were good investments and were suitable for use as homesites, farms, and ranches. Gross and Kritzler also prepared or approved television and radio advertisements that broadcast deceptive investment and use representations. (Kritzler Tr. 575; Gross Tr. 411) The individual respondents approved the use of other deceptive materials, including the fact sheets that omitted critical information about development costs, printed materials used by Porter Realty, and Porter Realty's telephone scripts. (CXs 122125) Kritzler discussed marketing strategies and materials with Porter on a regular basis and was aware that Porter Realty was using the deceptive "oil map" for up to a year but did not successfully stop its use until the broker's contract was terminated.

The personal involvement of the individual respondents and their control over the marketing program were pervasive. In addition to directing the market efforts of their brokers and sales representatives, Gross and Kritzler participated actively in the sales operations and engaged in various communications with prospects and purchasers. Both Gross and Kritzler wrote letters to purchasers of the land stressing its value and repeating the investment theme. (CXs 118, 224, 473, 553, 535) Kritzler was also involved in various discussions with consumers who testified as to his oral representations about the land's value and

likely fast appreciation. (Leuckel Tr. 1840; Robinson Tr. 1919; Danskin Tr. 2432)

We can only conclude that the individual respondents had an active and personal role not simply in managing the corporations but in designing and carrying out a program of unfair and deceptive practices to induce consumers to purchase their land. Their involvement goes beyond simple tacit awareness, in their official capacities, of the unfair and deceptive practices employed by their representatives. Instead, Gross and Kritzler were primarily and personally responsible for creating the marketing program used by others and for directing the activities of the corporate respondents and their brokers in such a way that these parties, too, violated the law. For all of these reasons, we believe an order must be entered against Gross and Kritzler as individuals. Failure to do so would significantly diminish the impact of our ruling and reduce our ability to protect consumers from a possible repetition of these practices.

## B ORDER PROVISIONS

The Order issued with this Opinion governs respondents' land sales and promotional activities at SWS, GVA, and GVA II as well as at other similar land sales projects. Part I of the Order limits certain representations respondents may make regarding the value or utility of land they sell by requiring that such representations be nonmisleading and supported by a reasonable basis. Specific misrepresentations are also prohibited. Part II requires respondents to disclose to prospective purchasers material information about the land by providing prospects with presale fact sheets. In Part III, respondents are ordered to place warnings in their advertising and promotional materials and to provide consumers a seven-day right to cancel their contracts. Part IV requires respondents to send notices to customers who purchased land explaining what the land's value and suitability for use are and outlining alternatives available to customers. Part V contains a number of administrative obligations, notably requirements that respondents take a variety of steps to discourage employees and agents from engaging in violative practices, and that they institute a surveillance program to detect such practices. The Order as a whole is designed

to allow consumers to consider whether to buy land from respondents under circumstances free of misrepresentations and with full and accurate knowledge of information that is material to a purchase decision.

**1. Definitions**

The Order contains five definitions. The term "Respondents" is defined to mean all of the corporate and individual respondents as well as any one of them acting independently or through some agent or device. Thus each respondent is obliged to conform his or its conduct to the Order provisions and to avoid engaging in violative practices jointly or severally.

The provisions of the Order apply only to respondents' practices in selling land, which is defined as in our decision in *AMREP Corp.*, 102 F.T.C. 1362, 1675 (1983), *petition for review filed* No. 84-1434 (10th Cir., April 2, 1984), to mean unimproved real property. The practices leading to imposition of an Order here involved sales of unimproved real estate only. It is unlikely that respondents would or could easily transfer their deceptive marketing activities to the sale of new homes or other improved realty. We therefore find it appropriate to limit the Order's reach to the marketing and sale of unimproved land.

We retain the definitions of "purchaser" and "Commission" in a form similar to that which complaint counsel proposed but delete the definition of "subdivision" as unnecessary in view of revisions to the Order that delete use of that term. Finally, a definition of "homesite" is added. The definition is adopted from ILSFDA regulations, 24 C.F.R. §§ 1700.1 et seq. (1983), and is designed to provide consistency between the obligations placed on respondents by this Order and under other federal law.

**2. Part 1—Prohibited Representations**

Part I of the Order governs the use of certain representations about the value of property that respondents sold, either as an investment or for particular uses. The Order allows respondents to provide potentially helpful information to consumers about the value of property they sell, so long as it is not

presented in a misleading fashion and is supported by a reasonable basis in fact. While the complaint in this case alleged that respondents' claims were false and did not allege that the claims had inadequate substantiation, we believe that barring respondents from making claims about the investment value or potential uses of the property in all circumstances is inappropriate and would not benefit consumers. Instead, as in *AMREP Corp., supra,* 102 F.T.C. at 1676-77, respondents may make truthful and nonmisleading representations under the conditions set out in the order. This provision protects the public interest by limiting respondents from future efforts to use misrepresentations to sell property or to induce payments on accounts outstanding while at the same time assuring that truthful and nondeceptive information, that may be helpful to consumers, is still available to the public. This "fencing in" provision, replacing what would otherwise be a flat ban, is justified as a means of preventing respondents from engaging in similar false and deceptive representations in the future. *See FTC v. Ruberoid Co.,* 343 U.S. 470, 473 (1952); *AMREP Corp., supra,* 102 F.T.C. at 1676.

Respondents are enjoined under Part I.A. of the Order from making the enumerated representations unless they are not misleading and they are substantiated. This prohibition extends to use of such representations not only in the marketing and sale of land, but also in efforts to induce customers to continue making payments on land previously purchased. Extension of these provisions to nonsale situations is necessary to prevent respondents from continuing practices we have found to be unfair: inducing payments and retaining money paid by using misrepresentations and deceptive statements and omissions about the land.

The representations covered by these provisions correspond to those identified in this Opinion and include claims about the value, profitability, safety, ease of resale, benefits, and use of land. Rather than prohibiting the precise statements respondents used (which would involve a lengthy list of oral and written claims), we have identified several categories of deceptive representations. Thus the specific deceptive claims respondents used as well as claims "like and related thereto"

are prohibited by the Order. *See FTC v. Mandel Bros., Inc.*, 359 U.S. 385, 393 (1959). The Order restricts use of these representations in land sales by respondents at the subject properties and elsewhere. Application of the Order to promotional activities for the sale of any unimproved realty by respondents will guard against future violations of the FTC Act similar to those used at SWS, GVA, and GVA II.

These portions of the Order are, we believe, reasonably related to the unlawful practices we have found to exist. *See FTC v. Colgate Palmolive Co.*, 380 U.S. 374 (1965); *Jacob Siegel Co. v. FTC*, 327 U.S. 608 (1946). However, we decline to include in the Order additional provisions sought by complaint counsel regulating respondents' use of claims about the availability and price of land since we do not believe restrictions on such claims are needed here to fence in respondents or to protect the public interest. *See FTC v. National Lead Co.*, 352 U.S. 419 (1957).

The substantiation required before respondents may use the enumerated representations is defined in the Order. The substantiation must consist of "competent and reliable evidence" and must include data demonstrating that typical owners are likely to achieve the results claimed. In addition, where respondents seek to use representations that are predictive in that they claim that certain events or developments are likely to or will occur, respondents must have evidence of the sort that would generally be accepted by qualified experts as providing a reasonable basis for the projection. The approach we follow here parallels the order in *AMREP Corp.*, *supra*, where we distinguished between those claims that are presently verifiable with, for example, historical data about resales of land, and those claims that forecast future developments that can be verified only by relying on experts' views about what existing data tell us about the future. Though we do not include in this Order the detailed requirements for substantiating predictive claims set forth in *AMREP Corp.*, the level of support ultimately required for such claims is the same in both cases: respondents may not represent that land has or will have investment value, profitability, benefits, or potential uses without a level of support that satisfies experts in the field

of the existence of a reasonable basis for the claim and without data establishing that typical owners can achieve what is claimed. To assist the Commission's assessment of respondents' compliance with these substantiation requirements, we have added a provision, Section I.B., requiring respondents to maintain evidence in support of and relied on as substantiation for such claims.

Part I.C. of the Order limits respondents' use of claims about the immediate suitability of land for various applications. This provision prohibits claims that the land is currently usable as a homesite, farm, or ranch unless the land is in fact immediately usable for such purposes without substantial improvements or developments. The complaint did not allege that respondents misrepresented the time frame in which the land could be used or made suitable for use. Respondents did, however, misrepresent the suitability of the land. They failed to disclose the excessive costs of development and improvement that are a prerequisite to most uses of the land while marketing the land for use as homesites, farms and ranches—pursuits for which improvements must be made and they depicted these uses verbally and visually in their materials and sales presentations. We believe this provision is therefore warranted as a fencing-in measure to complement other restrictions on respondents' ability to misrepresent the suitability and usefulness of land they market.

Part I.D. of the Order prohibits respondents from making a number of misrepresentations. These include misrepresentations of the cost or availability of utilities, the likely development of respondents' land, and the extent and significance of mineral resources. These provisions relate directly to practices we conclude respondents engaged in and they are needed to prevent respondents from continuing to make the sorts of misrepresentations we have identified.[99]

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[99] Respondents' attacks on these provisions as unsupported by record evidence are unconvincing. Respondents argue with respect to I.D.2. (prohibiting misrepresentations of the purchase, use, or development of the land) that respondents fulfilled all their respresentations about development of the land by building roads and a golf course. This ignores the more serious

*(footnote continues)*

Two additional prohibitions on misrepresentations that complaint counsel seek would have stopped respondents from misrepresenting population, employment and industrial statistics and would have eliminated misrepresentations about the independent authorship or production of articles used by respondents as promotional tools. Respondents misrepresented the value of their land by claiming future commercial and industrial developments, and they also provided consumers with flattering materials about their land which appeared to have been produced independently but which may have been subsidized or influenced by respondents. However, we do not find the proposed provisions concerning population, employment and industrial statistics to be reasonably related to the problems they purport to address, problems that are corrected through other provisions included in the order. Nor do we find respondents' use of subsidized articles to be a widespread practice of significant moment. Hence we decline to order these prohibitions.

### 3. Part II—Fact Sheet

Part II of the Order addresses the omissions of fact respondents allowed in their marketing and sales activities. Respondents are required in Part II.A. to send to actual and prospective purchasers a Fact Sheet for Buyers (Attachment A to the Order).[100] The Fact Sheet warns consumers of the risks and uncertainties of investing in land and informs them that expenditures may be needed to make the land suitable and that

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*(footnote continued)*

claims respondents made about industrial and commercial development of the land (including oil exploration) that would increase its value, and it is to these and any similar claims that this provision is addressed. Respondents challenge Part I.D.3. on the grounds that no misrepresentations of mineral rights were alleged or proved. Defining mineral rights to include oil and gas, as we do, establishes the relevance of this provision.

[100] The procedures and conditions under which respondents must distribute the Fact Sheets parallel those in *AMREP Corp.*, 102 F.T.C. 1362 (1983), *petition for review filed*, No. 84-1434 (10th Cir., April 2, 1984), and *Horizon Corp.*, 97 F.T.C. 464 (1981). As a rule, respondents must distribute the Fact Sheets in a way that allows prospective purchasers an ample, uninterrupted, and unhurried opportunity in which to review them.

these expenditures may be so great as to make use of the land impractical.[101]

Two versions of the Fact Sheet must be produced.[102] If respondents provide consumers with a federal property report as required by the Interstate Land Sales Full Disclosure Act and related regulations, 15 U.S.C. §§ 1701 to 1720 (1982); 24 C.F.R. §§ 1700.1 et seq. (1983), the Fact Sheet will be quite curtailed, consisting principally of the warnings and disclosures just described along with an advisement that consumers have the terms or merits of their purchase evaluated by a qualified professional before signing anything.[103] If no federal property reports are provided so that consumers may not be receiving detailed information about the availability and cost of utilities on the land, then this information must appear in the Fact Sheet. In this situation the Fact Sheet must include descriptions of the availability of and estimates of the costs for water, sewage disposal, and electric and telephone service. Disclosures sought by complaint counsel as to roads, recreational facilities, a property owners' association, taxes, and lot exchanges are not in our view reasonably necessary to prevent the

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[101] A number of investment value disclosures and warnings are required throughout the Order, to appear in Fact Sheets, advertising and promotional materials, and Notices to customers. We have revised each of the various disclosure obligations contained in complaint counsel's proposed Order to make them similar in content and form so that consumers will see consistent information and similar warnings in the various materials and presentations they encounter.

[102] Requiring two versions of the Fact Sheet is a variant on our approach in *AMREP Corp.*, 102 F.T.C. 1362, 1679 (1983), *petition for review filed*, No. 84-1434 (10th Cir., April 2, 1984). There we ordered only a single, short notice and declined to order repeated in the Fact Sheet the same disclosures required in the federal property report since we believed consumers might be confused or overwhelmed by such a wealth of information. Here we avoid the potential for duplicative disclosures by eliminating most of them from the Fact Sheet when consumers receive the federal property report, but we retain the disclosures needed to inform consumers fully about the land, utilities, and their cost in circumstances where property reports are not provided as they were not throughout all of respondents' operations at SWS, GVA, and GVA II. This approach also reduces substantially the burden of which respondents complain. (RAB 69-70)

[103] Prospective purchasers are also alerted to the existence of the federal property report and encouraged to read it.

abuses identified in this proceeding and we decline to include them as fencing-in relief.

These disclosure obligations are needed to ensure that respondents provide prospective purchasers accurate and complete information about the land they are considering buying so that informed decisions can be made prior to sale. Many of respondents' transactions occurred over the telephone and through the mails, and most buyers lived out-of-state, never visited the land, and so had few opportunities to learn the truth about their purchases. These disclosures will provide prospective purchasers with material information they might otherwise not have available so that they can better determine whether purchase is a wise move.[104] In addition, in conjunction with the post-purchase cancellation right ordered in Part III, these disclosures give consumers a basis on which to found decisions to cancel. A cancellation period standing alone is not adequate in this case to protect consumers since it furnishes only the time and opportunity but not the information needed to reconsider a purchase decision. Thus the disclosure obligations ordered in Part II supplement the other rights we give consumers under this Order.

Additional provisions are included in Part II to further ensure that consumers receive truthful information about the property in advance of signing a contract. Thus Part II.B. provides that if respondents fail to provide purchasers with a copy of the Fact Sheet as prescribed by Part II.A., such purchasers may rescind their contracts and recover all payments within 30 days of the time they finally do receive the Fact Sheet. In view of the extreme importance to purchasers of the information in the Fact Sheet, we feel obliged to allow purchasers this alternative both to deter respondents from failing to

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[104] Respondents are mistaken to the extent they believe no additional information, such as the name and telephone number of the electric company, may be furnished to prospective purchasers. (RAB 69) The Order prohibits respondents from including additional information in the required Fact Sheet but does not prevent them from supplementing this information in their promotional brochures or through other devices, so long as they do not misrepresent the information contained in the Fact Sheet. *See* Order Parts II.A., C., D.

provide the Fact Sheet and to accord a remedy to purchasers who might not have bought had complete information been available to them before purchase. Conditional rights of rescission allowed only in circumstances where respondents have violated this Order do not, in our view, run afoul of the decision in *Heater v. FTC*, 503 F.2d 321 (9th Cir. 1974), prohibiting the award of retrospective relief. *See AMREP Corp.*, 102 F.T.C. 1362, 1684 (1983), *petition for review filed*, No. 84-1434 (10th Cir., April 2, 1984).

Finally, Parts II.C. and II.D. prohibit respondents from misrepresenting information in the Fact Sheet and from making representations that differ materially from the Fact Sheet or from the federal property report required by the ILSFDA, 15 U.S.C. §§ 1701 to 1720 (1982). Respondents argue that there is no allegation or proof that such misrepresentations occurred. Of course, since respondents were not obliged to and did not furnish prospects with a federal property report, they could not have misrepresented its contents. The record establishes, though, that respondents did misrepresent the points that would be made in a federal property report and in their Fact Sheets through inaccurate descriptions of the land's suitability and through deceptive omissions of fact. We therefore believe these provisions are warranted to ensure that respondents do not distort, undercut or misleadingly embellish the required factual disclosures. We also believe that such relief reasonably relates to the omissions and inaccuracies we have found in the information respondents did supply to prospective purchasers.

The comprehensive protections afforded by these and other provisions in Part II allow us to dispense with provisions sought by complaint counsel mandating that the Fact Sheet be attached to respondents' contracts with consumers and incorporated therein.

**4. Part III—Disclosures in Promotional Materials and Right of Cancellation**

Part III of the Order gives consumers additional warnings and a limited cancellation right. Part III.A. requires respondents to disclose in their advertisements and promotional materials the uncertainty of land as an investment and the

importance of discussing any purchase of land with a qualified professional. Because of the limitations of different media, shorter and simpler disclosures are permitted in television and radio advertisements and in magazine and newspaper articles of one-quarter page or less. Since respondents' advertisements and promotional materials were the vehicles through which many deceptive claims were made, we deem it appropriate that they should in the future be accompanied by these brief corrective disclosures.

Contrary to respondents' assertions, we need not find that respondents discouraged consumers from seeking professional advice in order to require respondents to disclose that prospective purchasers should do so. This admonishment flows from and is justified by the array of misrepresentations respondents directed at consumers, misrepresentations that might have been corrected had consumers discussed their purchases with a knowledgeable professional. The disclosures required by Part III.A. will supplement those in the Fact Sheet and disseminate the information widely by placing it in respondents' advertising and promotional materials.

Also included in this Part is a mandatory seven-day right of cancellation for consumers similar to that contained in the ILSFDA, 15 U.S.C. §§ 1701 to 1720 (1982) and the Commission's Rule on Door-to-Door Sales, 16 C.F.R. § 428 (1984). *See also AMREP Corp.*, 102 F.T.C. 1362, 1680 (1983), *petition for review filed*, No. 84-1434 (10th Cir., April 2, 1984). We have shortened the cancellation period from the ten-day period complaint counsel urged to a seven-day period equivalent to that imposed on many other land sellers under ILSFDA. Reference to the right of cancellation is required by Parts III.B. and III.C. to appear in respondents' contract as well as in a separate form, attached to the Order as Attachment B, two copies of which must be provided to purchasers.[105] Included in

[105] Our approach differs from that taken in *AMREP Corp.*, 102 F.T.C. 1362 (1983), *petition for review filed*, No. 84-1434 (10th Cir., April 2, 1984), where the Order required that the right of cancellation be announced in the contract but eliminated a requirement that a cancellation form be provided. That was done in part because AMREP's purchasers were expected to receive

*(footnote continues)*

the cancellation right is a requirement that customers be left free from additional sales pitches and contacts by respondents during the cancellation period. On those occasions where respondents nevertheless make such a contact, Part III.C. extends the purchaser's right to cancel to 30 days after the dates of purchase.[106] It the cancellation notice form is not provided when required, the Order gives purchasers an additional seven days to cancel after receiving a copy of the form.

Part III.D. of the Order contains additional provisions regulating how respondents must honor purchasers' cancellation right. Purchasers may exercise their right to cancel either by sending respondents the cancellation form or providing equivalent notification. Once notified, respondents are allowed 30 days to refund purchasers' money and to cancel and return their contracts. Part III.E. prohibits respondents from infringing on the cancellation right provided under this Order by causing purchasers to waive or limit their rights.

Although the complaint did not allege and the record did not reveal evidence of high pressure sales tactics, we believe a cancellation provision is warranted nonetheless. Respondents' sales program was permeated with deceptive representations and omissions of material facts designed to induce consumers to purchase their land. Providing consumers a seven-day cancellation period will allow them to rescind their contracts and have

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*(footnote continued)*

a cancellation notice and form with the federal property report. *See id.* at 1681. Since this may not occur with respondents' sales, the requirement that a separate cancellation form be provided is in order. Dividing these obligations between two documents also allows us to summarize the information provided in the contract and refer readers to the separate form, where customers' rights are explained more fully.

[106] These provisions differ somewhat from those ordered in *AMREP Corp., supra*, 102 F.T.C. at 1681, where some contacts with purchasers were allowed and others forbidden and where the forbidden contacts triggered an extension of 45 days in the cancellation right only if consumers notified AMREP within 30 days. Because of the difficulties consumers might have distinguishing between proper and improper communications from respondents, we choose here simply to impose a short but complete moratorium on such contacts. We also provide for a shorter but simpler extension of the cancellation right in situations where contacts are made to avoid the more cumbersome two-part notification process set forth in *AMREP Corp.*

refunded any money paid should they learn of inaccuracies or omissions in the information they received or should they otherwise determine their purchase was unwise. The record does reflect that many purchasers lived out-of-state and had little independent information about the land they bought, a situation that magnified the effect of respondents' misrepresentations and deceptive omissions. Arming purchasers with full and accurate information under Part II of the Order and providing them with a right to cancel after a period of time allowing for full reflection and consideration of the information they will receive furthers the Commission's objectives here by giving consumers some ability to protect themselves.

**5. Part IV—Notice to Consumers**

Respondents must send a separate form of Notice to Customers, in the form set forth as Attachment C to the Order, to consumers who previously purchased from respondents land in SWS, GVA, or GVA II, in accordance with Part IV.A.[107] This Notice provides to purchasers much of the same information about costs and availability of utilities that prospective purchasers will receive in the Fact Sheet or federal property report. It also advises consumers of the low value of their land, its unsuitability for certain uses, and the possibility that resales may be difficult to arrange.

Quite a lot of factual information is included in this Notice, including an assessment (based on evidence in the record) of the land's fair market value in 1980 and estimates of the cost of installing utility services. To ensure that these Notices are factually accurate when they are sent to customers 60 days after the Order becomes final, we have provided respondents with a mechanism to propose appropriate revisions which may be incorporated into the Notice unless the Commission objects. The information respondents must disclose about purchasers' future options is similar to that ordered in *AMREP Corp., supra.*

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[107] To help ensure these notices reach all intended recipients, respondents must make reasonable efforts to locate purchasers whose notices are undelivered because the addresses are outdated or incorrect. Copies of the Notice must be sent to all purchasers for whom new addresses are discovered after an initial nondelivery.

Part IV.C. of the Order was not requested by complaint counsel but is, we believe, necessary to complete the remedial scheme of this section of the Order. That provision bars respondents from recovering from defaulting buyers any amounts remaining due on their contracts after the default. We ruled in *AMREP Corp.* that such a clause was "necessary to prevent AMREP from obtaining future profits by enforcing contracts against defaulting buyers where those buyers entered into them in an atmosphere of fraud and deception." 102 F.T.C. at 1683-84. Here as in *AMREP Corp.* it would be intolerable to force respondents to enlighten consumers about the inaccuracies and omissions in the information they received, and yet to permit respondents to continue reaping the fruits of their deception by allowing them to enforce purchasers' contracts. Similarly, we found respondents' inducement and retention of funds, in payment for land that was misrepresented, to be unfair trade practices, and we cannot permit respondents to continue benefitting from illegality within our power to halt. We therefore hold that respondents must allow purchasers to stem the continuing injury caused by respondents' unfair and deceptive practices. As in *AMREP Corp.*, the right to default without fear that remaining obligations can be enforced extends to all purchasers irrespective of the date they executed their contracts. *AMREP Corp., supra,* 102 F.T.C. at 1685.

The requirements of this Part, involving affirmative disclosures to past purchasers, do not as respondents contend exceed the Commission's authority under Section 5. (RAB 70) *See Heater v. FTC,* 503 F.2d 301 (9th Cir. 1974). The court in *Heater* prohibited retroactive remedial action by the Commission but did not limit the Commission's right to require affirmative action as a prospective remedy. As the court observed in *Warner-Lambert Co. v. FTC,* 562 F.2d 749 (D.C. Cir. 1977), *cert. denied,* 435 U.S. 950 (1978), the decision in *Heater* does not limit the Commission's ability to order affirmative remedial measures under Section 5, such as corrective advertising, when necessary to "correct misconceptions which *future* consumers may hold." *Id.* at 757 n. 33. *See also*

*Waltham Watch Co. v. FTC*, 318 F.2d 28, 32 (7th Cir.), *cert. denied*, 375 U.S. 944 (1963).

The Commission has required firms to take affirmative action as a prospective remedy in several cases, as respondents concede. (RAB 70-71) Thus the Commission ordered a warning letter sent to past purchasers of respondents' "psychic surgery" as a means of remedying the continuing effects of past deception. *Travel King, Inc.*, 86 F.T.C. 715, 774-75 (1975). The Commission also required affirmative disclosures to previous customers about their rights and possible remedies in a case reversed on procedural grounds. *Ford Motor Co. v. FTC*, 94 F.T.C. 564, 605 (1979), *rev'd on other grounds*, 673 F.2d 1008 (9th Cir. 1981), *cert. denied*, 459 U.S. 999 (1982). And the Commission ordered affirmative disclosures virtually identical to those here in another land sales case. *AMREP Corp., supra*, 102 F.T.C. at 1678-80. *See also Horizon Corp.*, 97 F.T.C. 464 (1981).

The Notices ordered by Part IV.A., like those just described, are needed to remedy respondents' deceptive omission of information. Because this practice has continuing ramifications for consumers, many of whom may still be making payments on land purchased under significant misrepresentations, a corrective disclosure measure designed to dispel current and future misconceptions is justified. The Notices required by this Part are also legitimate as a means of remedying respondents' continuing unfair practices of inducing continued payments for land through misrepresentations. This relief is quintessentially prospective in nature. It is directed at future payments respondents may induce or retain and it provides consumers with important corrective information needed to dispel the misimpressions respondents created, misimpressions that will continue until affirmative efforts are made to dispel them. The prohibition against enforcement of defaulting purchasers' contracts is likewise a prospective measure authorized under Section 5. *See AMREP Corp., supra*, 102 F.T.C. at 1683-85. This provision bans the future enforcement of such contracts but does not order refunds or redress past injury resulting from respondents' violations of law. For all of these reasons we believe these order provisions are justified.

### 6. Part V—Additional Provisions

The provisions of Part V are largely administrative in nature and supply additional assurances that respondents' obligations under the Order will be carried out effectively. Of special importance is the provision in Part V.F. requiring respondents to institute a continuing surveillance program that will lead them to investigate and resolve complaints about sales practices used. Parts V.A., H., I., and J. obligate respondents to distribute copies of the Order, to notify the Commission of changes in the corporate respondents, and to file compliance reports.

Complaint counsel originally sought restitution in this Section 5 proceeding but have now withdrawn their pursuit of that remedy in this forum. (CCAB 50 n. 24) If buyers are entitled to restitution or other forms of redress for injury caused by respondents' violations of Section 5, their remedies should be sought in a proceeding under Section 19(b). 15 U.S.C. § 57(b) (1982); *see AMREP Corp., supra,* 102 F.T.C. at 1674. When the Commission's order in this matter becomes final the Commission will consider whether to seek redress for the unfair and deceptive acts or practices of respondents in accordance with the provisions of Section 19(b).

We decline to include in the Order other provisions proposed by complaint counsel, including a requirement that respondents maintain a toll-free telephone line for customer inquiries, because we do not believe they are reasonably necessary to remedy the violations of law.

## CONCLUSION

For all of the reasons set forth above, the Initial Decision of the ALJ is modified as described and the attached Order is entered.

ISSUED: January 15, 1985

Supreme Court, U.S.
FILED
AUG 29 1986
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 85-2142

# In the Supreme Court of the United States

OCTOBER TERM, 1986

SOUTHWEST SUNSITES, INC., ET AL., PETITIONERS

*v.*

FEDERAL TRADE COMMISSION

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

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191

## QUESTION PRESENTED

Whether the court of appeals correctly rejected petitioners' argument that the Federal Trade Commission's finding that they had engaged in "deceptive acts or practices" was based on a standard to which petitioners had no opportunity to respond.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 1 |
| Statement | 2 |
| Argument | 7 |
| Conclusion | 14 |


## TABLE OF AUTHORITIES

Cases:


*American Home Products Corp.* v. *FTC*, 98 F.T.C. 136, aff'd, 695 F.2d 681 ..... 8, 11
*Avnet, Inc.* v. *FTC*, 511 F.2d 70, cert. denied, 423 U.S. 833 ..... 8
*Bendix Corp.* v. *FTC*, 450 F.2d 534 ..... 8, 9, 10
*Bristol-Meyers Co.*, 85 F.T.C. 688 ..... 11
*Cinderella Career & Finishing Schools, Inc.* v. *FTC*, 425 F.2d 583 ..... 11-12
*Cliffdale Associates, Inc.*, 103 F.T.C. 110 ..... 4, 5, 13
*Crown Central Petroleum Corp.*, 84 F.T.C. 639 ..... 12
*FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374 ..... 12
*FTC* v. *Southwest Sunsites, Inc.*, No. CA 3-80-0258-F (N.D. Tex. May 19, 1980), aff'd in part and rev'd in part, 665 F.2d 711, cert. denied, 456 U.S. 973 ..... 4
*FTC* v. *Sperry & Hutchinson Co.*, 405 U.S. 233 ..... 10, 11
*Firestone Tire & Rubber Co.*, 81 F.T.C. 389, aff'd, 481 F.2d 246, cert. denied, 414 U.S. 1112 ..... 11, 12
*Ford Motor Co.*, 87 F.T.C. 756 ..... 12
*Golden Grain Macaroni Co.* v. *FTC*, 472 F.2d 882, cert. denied, 412 U.S. 918 ..... 8
*Heinz W. Kirchner*, 63 F.T.C. 1282 ..... 4
*International Harvester Co.*, 104 F.T.C. 949 ..... 13
*Kroger Co.*, 98 F.T.C. 639 ..... 12
*L.G. Balfour Co.* v. *FTC*, 442 F.2d 1 ..... 8

Cases—Continued: Page

*NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333 ..... 8
*Rodale Press, Inc.* v. *FTC*, 407 F.2d 1252 ..... 9, 10
*Thompson Medical Co.*, 104 F.T.C. 648 ..... 13

Statutes:

Administrative Procedure Act, 5 U.S.C. 554(b) .... 6, 7
Federal Trade Commission Act, 15 U.S.C. (& Supp. II) 41 *et seq.*:
§ 5, 15 U.S.C. (& Supp. II) 45 ..... 3, 10, 11
§ 13(b), 15 U.S.C. 53(b) ..... 3

Miscellaneous:

3 Trade Reg. Rep. (CCH) ¶ 22,251 (May 13, 1985) ..... 3

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 785 F.2d 1431. The opinion and final order of the Federal Trade Commission (Pet. Supp. App. 1a-128a) and the initial decision of the administrative law judge are officially reported at 105 F.T.C. 7.

### JURISDICTION

The judgment of the court of appeals was entered on April 1, 1986. The petition for a writ of certiorari was filed on June 30, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. Petitioners, three corporations and two individuals, acquired three large tracts of land in a sparsely-populated, semi-arid region of West Texas, subdivided the tracts into small parcels, and resold those unimproved parcels at per-acre prices that were 15 to 25 times higher than the prices petitioners had paid (Pet. App. 2a-3a; Pet. Supp. App. 24a-25a) and that "far exceeded the market value estimated by expert witnesses for both [the Federal Trade Commission and the petitioners]" (Pet. Supp. App. 46a). Petitioners marketed the property through a multimedia campaign consisting of television, radio, and newspaper advertising and in-home presentations that touted the investment potential of the land, as well as its suitability for homes, farming, and ranching (*id.* at 26a-29a, 36a-44a, 55a-58a). Petitioners also engaged real estate brokers, who sold the land by telephone nationwide and to residents of the island nations of the South Pacific. Petitioners supplied the brokers' salesmen with promotional literature and approved scripts for their telephone sales. *Id.* at 26a-32a, 97a-100a.

The central theme of petitioners' sales campaign was that the land was a "good, safe investment" (Pet. App. 2a). Buyers were told that "industrial development was likely" and that "[o]il, rubber, nuclear and uranium interests were all potential developments" (*id.* at 2a-3a). In fact, however, the evidence showed that the land was a poor investment. The selling prices of the parcels "were far greater than [their] fair market value" (Pet. Supp. App. 90a) and "there was virtually no resale market for the land" (*id.* at 47a). Moreover, the steep initial expenditures required to obtain utilities, water, and other amenities

rendered the land unsuitable for use as homesites or for farming (*id.* at 58a). Nor were the parcels suitable for small-scale ranching, because the "arid, semi-desert land is capable of supporting only six to ten head of cattle for each 640 acres of grazing area" (*id.* at 70a).

2. On April 29, 1980, the Federal Trade Commission (FTC) issued an administrative complaint alleging that petitioners' marketing techniques constituted unfair and deceptive acts and practices in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. (& Supp. II) 45.[1] The complaint alleged that petitioners had (1) misrepresented that the undeveloped parcels were a good investment, involving little or no financial risk, and deceptively failed to disclose information concerning purchasers' financial risk; (2) misrepresented that the land was suitable for residential use, farming, and ranching, and deceptively failed to disclose material information regarding the suitability of the parcels for those purposes; and (3) sold land that was of little or no value for the purposes petitioners represented while unfairly retaining the proceeds from the sales (Pet. App. 3a; Pet. Supp. App. 23a-24a).[2]

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[1] The complaint also named one of petitioners' brokers, Porter Realty, Inc., and its president, Irvin Porter (Pet. Supp. App. 22a n.1), both of whom ultimately entered into consent agreements with the Commission. See 3 Trade Reg. Rep. (CCH) ¶ 22,251 (May 13, 1985).

[2] On April 9, 1980, the Commission, pursuant to Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. 53(b), sought a preliminary injunction in the Northern District of Texas restraining petitioners' land sales practices pending final disposition of the administrative complaint. On May 19, 1981, the district court entered a preliminary injunction as to

On July 29, 1982, the administrative law judge filed an initial decision and order dismissing the complaint. Thereafter, on October 14, 1983, the Commission issued what has since been referred to as the Commission's "Deception Statement."[3] The Decep-

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the corporate petitioners, holding that the evidence demonstrated a likelihood that they had misrepresented and failed to disclose material facts concerning the investment potential and suitability of the land for the represented purposes. *FTC* v. *Southwest Sunsites, Inc.*, No. CA 3-80-0258-F (N.D. Tex.), slip op. 5. On the corporate petitioners' appeal, the United States Court of Appeals for the Fifth Circuit sustained the district court's grant of injunctive relief, holding that the evidence "suggests a large-scale systematic scheme tainted by fraudulent and deceptive practices." *FTC* v. *Southwest Sunsites, Inc.*, 665 F.2d 711, 723, cert. denied, 456 U.S. 973 (1982).

[3] The "Deception Statement" is actually a letter sent by the Commission to the Honorable John Dingell, Chairman of the Committee on Energy and Commerce of the House of Representatives, responding "to the Committee's inquiry regarding the Commission's enforcement policy against deceptive acts and practices" (*Cliffdale Associates, Inc.*, 103 F.T.C. 110, 174 (1984) (footnote omitted) (reprinting text of Deception Statement)). From past FTC and judicial decisions defining and elaborating the statutory phrase "deceptive acts or practices," the Commission identified three elements. The first element—that a representation, act or practice be "likely to mislead"—reflects what the Commission noted was the long-established principle that it need not find actual deception to hold that a violation has occurred. *Id.* at 176. The second element—that a representation, act or practice be considered from the perspective of the reasonable consumer—reflects according to the Commission a longstanding position that the law should not be applied so that honest representations are found deceptive merely because they can be " 'unreasonably misunderstood by an insignificant and unrepresentative segment of the class of persons to whom the representation is addressed' " (*id.* at 178, quoting *Heinz W. Kirchner*, 63 F.T.C.

tion Statement, adopted by the Commission in *Cliffdale Associates, Inc.*, 103 F.T.C. 110, 164-166, 176 (1984), provides that "[T]he Commission will find deception if there is a representation, omission or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment." See Pet. App. 4a.

On complaint counsel's appeal from the administrative law judge's (ALJ) decision, the Commission independently considered the entire record, including the initial decision and findings of the law judge, and, applying the articulation of "deceptive practices" contained in the Deception Statement, unanimously concluded that petitioners had engaged in unfair and deceptive conduct (Pet. Supp. App. 1a-128a).[4] The Commission held that petitioners had misrepresented the investment potential of the land and had deceptively failed to disclose the uncertainty of its f .ture value as well as the total absence of a resale market (*id.* at 45a-49a). Moreover, because of the steep costs of developing the arid land, the difficulties of climate, the problems of pest control and flooding, and the virtual absence of local markets, the Commission determined that the residential, farming, and ranching uses petitioners claimed for the land were wholly im-

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1282, 1290 (1963)). The last element—that a representation, act or practice be material—reflects the Commission's concern that the law be applied only against misinformation that is "important to consumers" and therefore "likely" to affect a consumer's choice of or conduct with respect to a product (103 F.T.C. at 182).

[4] While accepting most of the factual findings of the administrative law judge, the Commission rejected his determinations on liability because it concluded that the judge had misapprehended the allegations of the complaint (Pet. Supp. App. 41a-42a, 58a-59a).

practical (*id.* at 58a-71a). Finally, the Commission held that petitioners had engaged in "unfair practices" by deceptively inducing consumers to purchase land that had no value for the advertised uses and by using misrepresentations to induce purchasers to continue making payments on the parcels (*id.* at 94a-96a).

To remedy these violations of law, the Commission entered a cease and desist order that restricted petitioners' future sales activities. These restrictions required, among other things, that petitioners provide prospective buyers with information concerning the risks of purchase and include in future sales contracts specific buyers' rights (Pet. Supp. App. 114a-125a). The order also directed petitioners to send a letter to previous buyers, advising them of the Commission's findings (*id.* at 125a-127a).

3. The court of appeals affirmed (Pet. App. 1a-12a). It held, inter alia, that the Commission's factual findings were supported by substantial evidence (*id.* at 7a-11a) and that the cease and desist order was clearly within the Commission's remedial authority (*id.* at 12a). The court also rejected petitioners' argument that the Commission had violated due process and the Administrative Procedure Act (APA), 5 U.S.C. 554(b), by applying the allegedly narrower articulation of the meaning of "deceptive acts or practices" set forth in the "Deception Statement" (Pet. App. 4a-5a). The court said, "The purpose of the notice requirement in the Administrative Procedure Act is satisfied, and there is no due process violation, if the party proceeded against 'understood the issue' and 'was afforded full opportunity' to justify his conduct" (*id.* at 4a (citation omitted)). Applying that standard, the court held that "[t]his is

not a case in which" "a 'substantially different standard was applied, to which [petitioners] had no opportunity to respond' " or in which " 'different defenses and proofs would be used in defending against . . . two theories' of liability" (*id.* at 5a (citation omitted)).[5]

## ARGUMENT

The court of appeals correctly rejected petitioners' due process and Administrative Procedure Act arguments. The court adopted what petitioners concede is the correct test: whether after the hearing before the administrative law judge "a substantially different standard was applied [by the agency], to which [petitioners] had no opportunity to respond" (Pet. App. 5a). The court correctly applied that test to the circumstances of this case, ruling that this was *not* a case where "different defenses and proofs would be used in defending against * * * two theories" (Pet. App. 5a): the complaint gave petitioners ample notice of the need to present any evidence and arguments they might have that their representations and practices were not likely to materially mislead reasonable consumers, and petitioners had a full opportunity to do so. There is no conflict with any decision of this Court or of another court of appeals, and review by this Court is not warranted.

1. Under the Administrative Procedure Act, 5 U.S.C. 554(b), any person who is otherwise entitled to notice of an administrative hearing must be informed of "the matters of fact and law asserted." But to satisfy the notice requirements of the APA and the Constitution, the agency need only give the

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[5] The court also rejected several other legal claims not presented in the petition (Pet. App. 5a-12a).

affected party a reasonable opportunity to know and meet the legal claims asserted. *NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 349-351 (1938); *Avnet, Inc.* v. *FTC*, 511 F.2d 70, 77 & n.18 (7th Cir.), cert. denied, 423 U.S. 833 (1975); *Golden Grain Macaroni Co.* v. *FTC*, 472 F.2d 882, 885-886 (9th Cir. 1972), cert. denied, 412 U.S. 918 (1973); *Bendix Corp.* v. *FTC*, 450 F.2d 534, 539-542 (6th Cir. 1971); *L.G. Balfour Co.* v. *FTC*, 442 F.2d 1, 19 (7th Cir. 1971). See also *American Home Products Corp.* v. *FTC*, 695 F.2d 681, 693-695 & n.21 (3d Cir. 1982). This is precisely the legal standard applied by the court of appeals. In rejecting petitioners' due process claim, the court held that "[t]he purpose of the notice requirement in the Administrative Procedure Act is satisfied, and there is no due process violation, if the party proceeded against 'understood the issue' and 'was afforded full opportunity' to justify his conduct" (Pet. App. 4a (citation omitted)). The court disagreed with petitioners only on the application of that standard to the circumstances of this case, determining that this was *not* a case in which " 'different defenses and proofs would be used in defending against . . . two theories' " (*ibid.*).[6]

2. The court of appeals' decision is entirely consistent with the decisions of the Sixth Circuit in

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[6] Petitioners err in relying on the court of appeals' observation (Pet. App. 5a) that "[a]ll evidence relevant to the old theory was necessarily relevant to the new" to show that the court applied some "novel 'relevance' test." The quoted observation plainly was not intended as the legal basis for the court's decision. The critical point is that petitioners failed to show that they had any evidence or argument that they did not present to the administrative law judge because it became relevant only under the Deception Statement articulation of the meaning of "deceptive acts or practices."

*Bendix Corp.* v. *FTC*, 450 F.2d 534 (1971), and the District of Columbia Circuit in *Rodale Press, Inc.* v. *FTC*, 407 F.2d 1252 (1968). Both of those cases involved the post-hearing adoption of an entirely new theory of liability, to which respondents had not had a fair opportunity to present defenses and proofs.

In *Bendix*, the Commission determined that an acquisition would lessen competition by eliminating the possibility that the acquiring company would instead enter the relevant market by making a so-called "toehold" acquisition; during the hearing, however, the Commission staff had relied on the quite different theory that the acquisition would eliminate the prospect that the acquiring company might enter the market by internal expansion (450 F.2d at 539-541). The court of appeals found that had the new theory been advanced earlier, respondent would have offered "different defenses and proofs" (*id.* at 541). Because "[t]he witnesses were questioned and cross-examined in terms of [the initial legal theory]" and "[t]he documentary proof was keyed to these theories," petitioner "was not accorded the opportunity to present proof and argument under the [new] theory of violation" (*id.* at 542).

In *Rodale Press*, the Commission ordered a publisher to cease placing particular advertisements promoting the sale of certain publications. The Commission found that the offending advertisements falsely represented that the publications would contain guaranteed cures for certain ailments when, in fact, the publications contained only qualified claims of cure. At the hearing, however, the parties had litigated on a quite different theory: that the advertisements correctly reported the contents of the publications, but that the cure-alls contained in the publications were

false. Judge Tamm, writing for the panel, held that this "change [of] theories in midstream" had deprived petitioners of "the *opportunity* to present argument under the new theory" (407 F.2d at 1256-1257 (emphasis in original)). Judge McGowan, joined by Judge Robinson, concurred, noting that the change in theories had denied the parties "an opportunity to defend, either by evidence or argument, against a charge *palpably different* from the one brought against them" (*id.* at 1258 (emphasis added)).

The court of appeals in this case applied the same standard as the Sixth and District of Columbia Circuits; the circuits are thus fully in accord on the governing principles. Here, as in those cases, the court inquired whether the new articulation of the meaning of "deceptive acts or practices" had effectively deprived petitioners of their opportunity to mount a defense. After examining the record, the court held that the application of the Deception Statement articulation did not abridge petitioners' full opportunity to defend "by evidence or argument" (*Rodale Press*, 407 F.2d at 1258 (McGowan, J., concurring)). Because the court of appeals applied the same standard as the courts in *Bendix* and *Rodale Press*, and merely concluded that under the circumstances of this case petitioners were *not* deprived of the opportunity to present relevant evidence or argument, there is no conflict and further review is unwarranted.[7]

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[7] This Court's decision in *FTC* v. *Sperry & Hutchinson Co.*, 405 U.S. 233 (1972)—on which petitioners also rely (Pet. 6-7)—simply does not address the issue posed in this case. There, the Court held that the Commission has the authority under Section 5 of the Federal Trade Commission Act to prohibit unfair methods of competition not otherwise forbidden by

3. Petitioners claim that there are two points on which, had they known that the Commission would apply the Deception Statement's articulation of the meaning of "deceptive practices," they would have offered different evidence or made different arguments. Both of these claims are plainly without merit.

Petitioners first argue that under "the new theory of deception * * * it would be relevant to survey consumers to determine the likelihood of deception" while "[u]nder the theory of deception at the time of the adjudication such evidence would have been irrelevant" (Pet. 7). But, first, petitioners ignore the fact that the Commission has long considered consumer surveys a valuable aid in determining the meaning of advertising. See, *e.g.*, *American Home Products Corp.*, 98 F.T.C. 136, 413-417 (1981), aff'd, 695 F.2d 681 (3d Cir. 1982); *Bristol-Meyers Co.*, 85 F.T.C. 688, 706-712, 744-745 (1975); *Firestone Tire & Rubber Co.*, 81 F.T.C. 398, 454-455 (1972), aff'd, 481 F.2d 246 (6th Cir.), cert. denied, 414 U.S. 1112 (1973). Indeed, the law is clear that when a party introduces extrinsic evidence on the meaning of advertising, the Commission must consider it. See *Cinderella Career & Finishing Schools, Inc.* v. *FTC*,

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the antitrust laws. However, because the Commission had predicated its order on a finding that the conduct in question *did* violate the antitrust laws—and had never relied on the broader Section 5 theory accepted by the Court—the Court was unable to uphold the order on its own terms. But the Court in *Sperry & Hutchinson* did not have any occasion to consider the standards that apply when a party asserts that its due process rights have been violated by a purported shift in an agency's legal theory.

425 F.2d 583, 585-589 & n.3 (D.C. Cir. 1970).[8] More important, the notion that petitioners had evidence that their advertising campaign was not "likely" to mislead, which they withheld because they thought the relevant standard was "tendency" to mislead, is neither plausible nor supported by any information either in the record or tendered to the court of appeals.

Equally mistaken is petitioners' contention (Pet. 8) that under the Deception Statement "evidence that the representations did not alter consumer behavior could have been decisive" while "[u]nder pre-existing law, it would have been unavailing for [petitioners] to have offered evidence that consumer decisions were not actually affected by the alleged representations." The Deception Statement does not suggest that practices must actually "alter consumer behavior" in order to be "deceptive." To the contrary, the Deception Statement states quite plainly, and consistently with prior policy, that "[t]he issue is whether the act or

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[8] Petitioners err in reading the Commission's decision in *Ford Motor Co.*, 87 F.T.C. 756, 794 (1976), to mean that survey evidence bearing on consumers' interpretation of challenged advertising is irrelevant under the previous definition of "deceptive practices" (Pet. 7). The *Ford Motor Co.* decision simply held that the Commission "is not required to survey public opinion" but may instead rely on its own " 'expertise * * * to interpret an advertisement' " (87 F.T.C. at 794, quoting *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 391-392 (1965)). Moreover, any trace of ambiguity in *Ford Motor Co.* is dispelled by prior and subsequent decisions of the Commission recognizing that agency's duty to consider extrinsic evidence submitted by the parties. See, *e.g.*, *Cinderella Career & Finishing Schools, Inc.* v. *FTC*, *supra*; *Kroger Co.*, 98 F.T.C. 639, 728-729 & n.11 (1981); *Crown Central Petroleum Corp.*, 84 F.T.C. 1493, 1540 (1974); *Firestone Tire & Rubber Co.*, 81 F.T.C. at 454.

practice is likely to mislead, rather than whether it causes actual deception" (103 F.T.C. at 176 (footnote omitted)). Later FTC adjudicatory opinions applying the Deception Statement reaffirm that the Commission is concerned with the risk of consumer harm, not actual injury or reliance. See *International Harvester Co.*, 104 F.T.C. 949, 1056 (1984); *Thompson Medical Co.*, 104 F.T.C. 648, 816 (1984); *Cliffdale Associates, Inc.*, 103 F.T.C. at 165. Thus, petitioners' claim that the Deception Statement makes relevant their supposed evidence that consumers did not actually rely on their advertisements is based on a misreading of the Deception Statement.

4. Petitioners also suggest (Pet. 8 (emphasis in original)) that had the articulation in the Deception Statement been promulgated prior to the hearing petitioners would have seized "the opportunity to address the effect of the change on the *staff's* case," presumably by contending that the staff had failed to meet its "burden of proof." But petitioners do not identify how, if at all, the staff's proof failed to measure up under what they perceive as the new "burden of proof"; nor do they challenge the court of appeals' determination (Pet. App. 7a-11a) that the Commission's findings were supported by substantial evidence.

The Commission regards the Disclosure Statement as merely a synthesis of elements of prior case law. See, *e.g.*, 103 F.T.C. at 175 (citation omitted) ("We have therefore reviewed the decided cases to synthesize the most important principles of general applicability"); *id.* at 165 ("These elements articulate the factors actually used in most earlier Commission cases identifying whether or not an act or practice was deceptive * * *."). Petitioners' contention that they were found liable on a fundamentally new theory,

which they did not have a chance to rebut, is simply without merit.

Finally, petitioners argue (Pet. 8) that the application of the Deception Statement "denied [them] the right to have the issues * * * decided in the first instance by the ALJ who observed the witnesses." But the Commission accepted, for the most part, the ALJ's factual findings, disagreeing only with his understanding of the allegations of the Complaint. Moreover, petitioners fail to suggest how, if at all, a fresh look at the evidence would have altered the factual findings or outcome of the case.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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